VII.

The principal place of business of this corporation shall be South Bend Pacific County, Washington.

In witness whereof we have hereunto subscribed our names, and executed these articles in triplicate this 24th day of
622 August, 1903.

JOHN W. KLEEB.
JOHN F. HOBI.

STATE OF WASHINGTON, *County of Pacific, ss:*

I, H. W. B. Hewen, a Notary Public of the State of Washington, residing at South Bend, Pacific county, Washington, do hereby certify that on this day personally appeared before me the within named John W. Kleeb, John F. Hobi who are each personally known to me to be the identical persons described in and who executed the above and foregoing Articles of Incorporation, and they and each of them acknowledged to me that they executed the same freely and voluntarily for the uses and purposes therein set forth.

In witness whereof I have hereunto set my hand and official seal this 24th day of August, 1903.

H. W. B. HEWEN,
Notary Public of Washington, Residing at South Bend, Washington.

[Seal H. W. B. Hewen, Notary Public, State of Wash.]

C. E. June 2, 1906.
Filed August 26-1903, at 8-10 A. M.

STATE OF WASHINGTON, *County of Pacific, ss:*

I, A. P. Leonard, auditor and ex-officio recorder of the county of Pacific, state of Washington, and custodian of the records and files thereof, hereby certify that the above and foregoing is a full, true, and correct copy of an instrument, and of the whole thereof, as the same appears in the files in my office.

Witness my hand and official seal affixed this 4th day of December, in the year 1903.

[SEAL.] A. P. LEONARD,
County Auditor.

Indorsed: Copy of Articles of Incorporation of the North Shore Boom and Driving Company. Def'ts Ex. 4. Filed Dec. 5, 1903. E. A. Seaborg, County Clerk.

(Here follow maps marked pp. 622*a*, 622*b*, 622*c*, 622*d*, & 622*e*.)

623 No. 5336.

NICOMEN BOOM COMPANY, a Corporation, Appellant,
v.
NORTH SHORE BOOM & DRIVING COMPANY, a Corporation, Respondent.

Filed Sept. 30th, 1906.

This is a contest between two boom companies, their booms being located near the mouth of North river in Pacific county, Washington. The action is in equity, and was commenced by the Nicomen Boom Company for the purpose of restraining the defendant, the North Shore Boom & Driving Company, from constructing a boom upon a portion of the waters of said river and within the limits of territory included in the plat filed by the plaintiff company, as required by law. Both companies are organized under the laws of this state which authorize the organization of corporations for the purpose of catching, booming, sorting, rafting, and holding logs, lumber, or other timber products. In April, 1900, being in due time after the organization of the plaintiff company, it caused to be filed in the office of the secretary of state of the state of Washington its plat and survey, showing so much of the shore lines and waters of North river and lands contiguous thereto as it proposed to appropriate under the laws of this state. Before beginning the construction of its boom, it submitted to the secretary of war of the United States a plan of its proposed improvements and a plat of the territory to be occupied thereby, and was by said war department granted permission to construct a boom within the limits of said river covered by said plat of location. The territory designated by said plat of location embraces the shores of North river, which river is tributary to Willapa harbor, a bay leading into the Pacific ocean, and the territory extends from near the mouth of the river on both sides for some distance up the stream. The plaintiff thereupon acquired by purchase such upland and shore land on the left side of said river, reckoning down stream, as was necessary for its use in the premises, and promptly proceeded to erect boom works along the left side of the river, but stopped short of the upper end of the territory
624 covered by its plat of location. The boom substantially constructed at a cost of about $16,000, and from the time of its erection until this controversy arose it was constantly operated as originally constructed. While the plaintiff has done some work above, yet its boom has never been completed beyond its rudder sheer as originally built. The plaintiff has, however, always expected to extend the boom within the limits of said plat of location as the demands of business might require, and some weeks before the commencement of this action it had ordered piling for the purpose of extending its boom as originally constructed about one thousand feet further up the river. Through some delay, for which plaintiff was not responsible, it did not have this piling upon the ground, and therefore did not commence the actual work of extending the boom

until some days after the defendant had commenced to construct its boom as hereinafter mentioned. It was estimated by the plaintiff that the output of logs on North river for the season next following would be largely in excess of the output for the previous year, and that in such case the enlargement of its boom would be necessary for the purpose of receiving and handling such increased output. About this time, in August, 1903, the defendant company was organized, and it also filed its plat and survey in the office of the secretary of state, showing so much of the water and shore lines of North river and land contiguous thereto as it proposed to appropriate for its boom and driving purposes. It also claims that before commencing to construct its boom, it secured from the war department of the United States permission to construct within its said location. The plat of location filed by the defendant in the office of the secretary of state covered substantially the part of the territory embraced in the plat of the plaintiff, lying above the upper end of the sheer boom constructed by plaintiff as aforesaid. The defendant then proceeded to acquire uplands and tide lands within its plat of location, on the right side of the river, considered necessary for its use in the operation of its proposed boom, such lands being on the bank op-
625 posite to the side of the river occupied by the plaintiff's boom as constructed. On September 4, 1903, the defendant began the driving of piles for the construction of its boom, and erected a line of dolphins within the limits of both said plats of location. Thereupon this action was brought. An emergency restraining order was issued, and afterwards, upon notice, a temporary injunction was granted pending final hearing of the action. It appears that the indemnity bond required by the court under the last named injunctional order was not given by plaintiff, and thereupon the defendant continued with its work of construction. At the time of the trial, the defendant had substantially completed the construction of its proposed boom. The boom of the defendant is so constructed that logs coming down the river intended to reach the plaintiff's boom will necessarily enter the main boom of the defendant. The booms as proposed by the plaintiff and defendant cannot both be constructed. If the boom of the plaintiff should be extended up the river, the passage between its line of dolphins and the dolphins of defendant on the other side of the stream would be so narrow as to block navigation. Moreover it would be impracticable to operate both booms under such circumstances. If the defendant is permitted to operate its boom as constructed, the boom of plaintiff will receive only such timber from up the river as may escape from the boom of defendant and such as may be transmitted through that boom to plaintiff. The foregoing facts are practically undisputed in the case, as we are advised by the record and the findings of the court and by such exceptions as were taken to the findings. Exceptions were taken to certain findings embodying facts not stated above and to the refusal to make certain others, and on this appeal errors are assigned thereon. There is, however, no discussion in the brief in reference to these claims of error, and no particular evidence is pointed out in support thereof. We therefore believe we have sub-

stantially stated the controlling facts, and that they may be treated as undisputed. After an extended trial and the consideration
626 of much evidence, the court entered judgment denying the plaintiff's application for an injunction, and dismissing the action. This appeal is from that judgment.

For reasons hereinbefore stated, we shall not discuss such errors as have been assigned in relation to the court's findings of facts, but shall confine ourselves to the matters discussed in the briefs, all of which involve the correctness of the conclusions of law and the judgment thereon. Boom companies in this state are quasi public corporations, having the power of eminent domain, required by law to file a map of location and to perform becoming services for all persons requesting the same. See §§ 4378-4394, 1 Bal. Code. The provisions embodied within the above cited sections comprise the substance of two acts of the legislature passed respectively in the years 1890 and 1895. Section 4379 contains the following:

"Any corporation hereafter organized for the purpose mentioned in the last preceding section of this chapter shall, within ninety days after its articles of incorporation have been filed, proceed to file in the offices of the secretary of state a plat or survey of so much of the shore lines of the waters of the state and lands contiguous thereto as are proposed to be appropriated for said purpose by said corporation."

Appellant complied with the above and built a boom covering a portion of the territory sufficient to meet the then demands, so far as appears. It becomes necessary to determine the extent of its rights in the remaining territory. It is respondent's position that appellant has lost its rights in the located territory within which it has not actually constructed boom works. In suggesting to this court the principles which appellant claims should be applied in the premises, it argues that an analogy exists between the rights acquired under the filing of location plats by boom companies in this state and those arising from the filing of similar plats by railroad companies. We have been referred to authorities which consider the rights of railroad companies with reference to their location plats, and these authorities we have examined. Under legislative schemes for the location of railroad lines which are initiated by the filing of plats of location, it is held that compliance with the law in that particular secures to the locating company the right to construct and
627 operate a railroad upon such line, exclusive in that respect as to all other railroad corporations and free from the interference of any party. The right to locate its line of road in the place of its selection is delegated to the corporation by the sovereign power. The further right to subsequently acquire *in invitum* the right of way and necessary lands for operation of the road from the land owners is likewise delegated. The source of the franchise is in the sovereign power, which power confers the franchise upon the corporation as its delegated representative, and the grant is for public and not for private purposes. It is held that, inasmuch as public considerations enter into the grant of the franchise, public policy therefore favors it for the public convenience and use, and that a railroad

company by the filing of its plat of location and by reason of the notice thereof, impresses upon the lands a right in the nature of a lien in favor of its right to construct, which ripens into title through purchase or condemnation proceedings. It is further held that when a franchise has been thus conferred, no other railroad company may acquire title to the lands within such a location, or construct a road thereon to the exclusion of the right of the first locating company to acquire such title *in invitum*, and to construct its road upon the lands. Injunction has also been adopted as the proper remedy to prevent such interference. In support of the above propositions, which we have stated generally, we cite the following authorities:

Rochester H. & L. R. R. Co. *v.* New York etc. R. R. Co., 110 N. Y. 128;

Barre Railroad Co. *v.* Railroad Companies, 61 Vt. 1;

Sioux City & D. M. Ry. Co. *v.* C., M. & St. P. Ry. Co., 27 Fed. 770;

Morris & Essex R. R. Co. *v.* Blair, 9 N. J. Eq., 635;

Titusville & P. C. R. R. Co. *v.* Warren & V. R. Co., 12 Phila. 642;

Williamsport etc. R. Co. *v.* Philadelphia etc. R. Co., 141 Pa. St. 407.

Railway Co. *v.* Alling, 99 U. S. 463.

Respondent argues that the suggested analogy between railroad companies and boom companies as organized under the laws of this state is not well taken, and it therefore urges that search must be made for some other line of authorities in order to find an analogy
628 applicable to the questions in this case. It cites and discusses cases relating to the diversion and appropriation of water for mining, milling, irrigation, and manufacturing purposes. We are not impressed with the force of the analogy suggested by respondent. The appropriation of water for the purposes mentioned is ordinarily for private use and not to serve the public generally. The appropriator is permitted to take as much water as he can reasonably use to supply his own private property. It is held that he must proceed with reasonable diligence to determine how much he requires, and not deprive others of the use of water which he does not require. He is not compelled to serve the public in any respect, and the amount of water he may appropriate for his necessary purposes does not depend upon the public. The primary object in granting charters to railroad companies is that they shall serve the public, and the right of eminent domain to secure right of way and necessary grounds is given to them in order to aid such public purpose. The same is true of boom companies under the statutes of this state. Both are strictly public service corporations, and are required by law to serve the public in their respective spheres of operation. That the legislatures intended that an analogy shall exist between the two classes of corporations may be inferred from the boom statute itself. Section 4378, 1 Bal. Code, which confers the power of appropriation of lands upon boom companies, provides as follows:

"If such corporation shall not be able to agree with persons owning

land, shore rights, or other property sought to be appropriated, as to the amount of compensation to be paid therefor, the compensation therefor may be assessed and determined and the appropriation made in the manner provided by law for the appropriation of private property by railways."

It will thus be seen that the method provided for appropriating private property by railroad companies is specifically adopted as the method for boom companies. Respondent argues, however, that the rights acquired by boom company locations are not similar to those acquired by railroad companies, in that it claims that the rights of the latter are corporeal in their nature, while those of the former relate to water and therefore constitute a mere license or usufruct, incorporeal in its nature. The state, however, has dominion
629 over both the land and the water. The legislative scheme for boom companies requires that the land owner shall permit his land to be subjected to the use of such companies, upon receiving compensation therefor, and the title is thus acquired. It is true the state does not pass title to the beds and waters of its streams, but as an accompaniment of the right to condemn adjacent lands it has directly conferred upon boom companies the right to locate and operate booms in such waters. As a part of the location plan, the plat and survey shall designate not only the lands but the waters desired to be used. The plat when filed becomes notice to the world of the appropriated territory, and while the state requires the upland owner to submit to the use of his lands, it also confers directly upon the locator the right of dominion over the water in aid of the other use. In considering these location rights we, therefore, see no reason for making a distinction between those acquired upon land and those acquired in the waters. The state has not only authorized both, but they are combined rights, having in view a common end, and neither would be useful for accomplishment of that end without the aid of the other. We therefore think the analogy suggested by appellant is forceful, and that the railroad cases cited are useful in aiding us to determine the principles applicable here.

Applying the rule followed in the railroad cases, appellant had the right, after filing its plat of location, to acquire the title to the lands within the limits of its location. It was an absolute right which it could enforce by condemnation proceedings to the exclusion of any other boom company that might seek to appropriate the same land. It did acquire these lands, not by condemnation, but by purchase. Having thus established its location and acquired the necessary lands, it proceeded to construct its boom, but did not construct it throughout the entire located territory, although it has always intended to do so as the public demand might require. We think in reason that the appellant had the right when it filed its plat of location and acquired property for the purpose of constructing its boom, to take into consideration the future requirements of its business, and that it should not be restricted merely to the territory required
630 at the time its first works were erected. It would seem that this must be so in view of the obligations appellant assumed as a public service corporation. The statute requires that it shall

catch, hold, and assort the logs and timber products of *all* persons requesting such service. Section 4381, 1 Bal. Code. Boom companies are also made liable for loss or damages resulting from neglect, carelessness, or unnecessary delay. Section 4384, 1 Bal. Code. If a boom company could not take into consideration the future development and growth of the timber industry in making its location, it would become greatly embarrassed in performing the services for the public required of it by law. Moreover, if in order to anticipate and provide for such development, it can hold its location selected for that purpose only by constructing its boom throughout its entire selected territory, then it is necessary to so construct in the beginning, and the expenditure of large sums of money might thus be required long in advance of any necessity for it in aid of the public service. In the case at bar the sum of $16,000 was expended in the beginning, which seems to have met the demands of that time. The construction throughout the located territory would have required the expenditure of a much larger sum of money without any present necessity for it, and would have exposed the additional constructed material to the action of the water and elements and to consequent deterioration and decay long before it would have been needed for the service of the public. That a boom company must have a discretion in locating its works and in determining the extent of necessary territory for its purposes is recognized in Samish River Boom Co. *v.* Union Boom Co., 32 Wash. 586. It is also held that the question of future needs of railroad companies in fulfilling their charter purposes and performing their public duties as common carriers, is one which should be given full consideration by a court before it undertakes to deprive a company of any part of its right of way in favor of another corporation. Such companies may anticipate future necessities and may for that purpose hold territory not in actual use to the exclusion of other companies.

Western Union Telegraph Co. *v.* Pennsylvania R. Co., 120 Fed. 362.

631 In the Matter of Staten Island Rapid Transit Co., 103 N. Y. 251;

Pittsburg, Ft. Wayne & C. Ry. *v.* Peet, 152 Pa. St. 488;

Appeal of Pittsburg Junction R. Co., 122 Pa. St. 511.

Having thus acquired the first right to construct a boom within its located territory, and having also the right to anticipate future needs of the service it had undertaken for the public, what rights, if any, does appellant have in the remaining territory above its boom as now constructed? It is evident that appellant never intended to abandon any part of its located territory. The court finds that it intended to extend its construction over this territory as necessity required. If there was an abandonment, it must have been by virtue of non-use of the territory in the way of failure to extend and operate the boom thereon. However, in the absence of legislative provision to that effect, mere non-user does not of itself constitute an abandonment. It is held that, without such legislative provision, courts are not justified in fixing a limit at which mere failure to con-

struct shall be held to be an abandonment. Abandonment is a question of intent, and while such intent may be found as a fact from long non-use, yet the non-use itself does not constitute an abandonment and does not of itself defeat or impair acquired rights.

3 Elliott on Railroads, § 931;
Townsend *v.* Michigan Central R. Co., 101 Fed. 757;
Roanoke Investment Co. *v.* Kansas City & S. E. R. Co. (Mo.) 17 S. W. 1000;
Perth Amboy Terra Cotta Co. *v.* Ryan (N. J.) 53 Atl. 699;
Dennison & S. Ry. Co. *v.* St. Louis S. W. Ry. Co. of Texas, (Tex.) 72 S. W. 161;
Welsh *v.* Taylor, 134 N. Y. 450;
Durfee *v.* P. D. & E. Ry. Co., 140 Ill. 435;
Barlow *v.* Chicago, R. I. & P. R. R. Co., 29 Ia. 276;
Memphis & L. R. Ry. Co. *v.* Humphreys (Ark.) 48 S. W. 86;
Eddy *v.* Chace, 140 Mass. 471;
Johnston *v.* Hyde, 33 N. J. Eq. 632.

Appellant has not, therefore, abandoned its location by mere non-use. If it has forfeited its rights therein, it must be due to
632 the operation of law for some further reason. Respondent insists that appellant did not proceed with diligence to construct its extended boom. Lack of proper diligence is an element to consider in determining whether there has been an actual abandonment. The court's finding however shows that the intention to extend the boom as the public service required always existed, and in the absence of a showing that diligence to meet that end was not exercised, we think there was not an abandonment. It is true, as respondent says, the cases hereinbefore cited recognize the necessity for diligence in order to hold location rights. In some of the cases a much longer, and in some a much shorter time elapsed than in the case at bar. What is diligence in any given case must depend upon the particular circumstances. The relation that the delay may bear to the proper past discharge of the locator's duties to the public, as well as the necessity for future needs in the discharge of those duties, should be taken into consideration. Viewed from that standpoint, for reasons already stated, we think there was not an abandonment for mere lack of diligence.

Respondent further contends that there has been a forfeiture by reason of the provision of the boom statute. Section 4378, 1 Bal. Code, contains the following:

"Provided, That any property acquired under the provisions of this chapter by the exercise of the right of eminent domain shall be used exclusively for the purposes of this chapter, and whenever the use of said property as herein contemplated shall cease for a period of one year, the same shall revert to the original owner, his heirs or assigns, upon the repayment of the original cost of same."

The above is from the statute of 1890. A similar provision was included in the statute of 1895, and is found in § 4388, 1 Bal. Code. It will be observed that the reversion declared by the statute is of lands which have been acquired by eminent domain, and it is evi-

dently for the benefit of the land owner who has involuntarily yielded his land for a specific purpose. The provision does not extend to any further rights than those acquired by eminent domain. Appellant acquired no lands within its location in that manner, but all were acquired by purchase. Moreover the provision applies to
633 lands, the use of which shall "cease" for a period of one year. We think the intention of the statute is to require that when lands, which have been actually used for booming purposes, have not thereafter been used for such purposes for the period of one year, there shall be a reversion. The reason for the provision seems to be that if the land has once been applied to the intended use and that use then ceases for a year, it shall be presumed that the necessity for its use no longer exists, and the land owner shall then be entitled to re-enter and occupy it. We do not think the statute applies to lands located with reference to future needs, the actual necessity for the use of which has not yet arisen, but which necessity may reasonably be anticipated.

"The statute provides that when such school house as is required of the town or district 'has ceased' to be thereon for two years, the lot may revert to the owner. Here the house has not ceased to be, nor begun to be, thereon. There must be the beginning before the end. This provision was intended to apply to an occupancy once had and abandoned."

Jordan *v.* Haskell, 63 Maine, 189.

Appellant further urges that, in any event, it is not within the province of respondent to ask a forfeiture, for the reason that the rights of appellant result from a compact or agreement between it and the state, and that inquiry into the question of ferfeiture can only be made by the state, and that, too, in a direct proceeding in the nature of *quo warranto* instituted for that purpose. That is both an interesting and important question, but, in view of what we have already said in reference to the merits of the question of forfeiture in this case, it is unnecessary to pass upon the proposition as to who may ask a forfeiture. The necessary limits of this opinion are already extended, and we are therefore unwilling to pass upon this question now unless it were a necessary factor in the disposal of the case. Appellant further urges that the record shows that the respondent's boom and location are not lawful, in that no sufficient permit has been granted to it by the war department of the United States. For reasons above stated, it is unnecessary that we shall examine that question.

Respondent argues that, if appellant is permitted to hold its location to the exclusion of the former from said territory, it will
634 virtually place appellant in control of a monopoly of the booming business upon North river. What may be the practical effect in that particular is not here for our consideration. We are simply called upon to determine appellant's rights under its location as accorded to it by the state. The legislature has wisely provided to prevent an oppressive monopoly as against the public by limiting the maximum charge that may be made by a boom company to

seventy-five cents per thousand feet. Section 4381, 1 Bal. Code. The record shows that appellant has never charged as much as the maximum rate. Still the legislature, without doubt, contemplated that competition may exist where topographical and geographical conditions will admit thereof and where prior locators, who have in good faith become established, may at the same time be protected in their locations. It is said that the boom statutes contemplate that more than one boom may exist upon the same river. That is true, and thereby the legislature has made clear that it did not intend to authorize an unconstitutional monopoly of a stream. If, however, the available booming extent of a stream be such as to reasonably prevent the operation of more than one boom, the effect of a single location cannot well be avoided. Such circumstances would not make a monopoly authorized by law as such, but the location would become the only one upon the stream by mere force of necessity. In any event, whatever may be the available booming extent of a stream, the legislature undoubtedly intended that those who in good faith venture to spend their money and become established as pioneers upon a stream shall be protected in the rights accorded them by virtue of their compliance with the location statute. It must have intended that, in the consideration of these rights, reference must be had to enlarged commercial necessities and to consequent future demands for public service. If the available extent of a river be such as to reasonably permit the operations of more than one boom company thereon, each will be protected in its location lawfully acquired, but prior rights must be protected. It is possible for a booming company in an effort to hold an entire stream to spread its plat of location over the whole available booming space
635 thereon. If such were the manifest or apparent purpose, without regard to reasonable present and future necessities, it would be an attempted fraud against the state and the public which could not be upheld. Such a purpose does not appear on the part of appellant. Sufficient good faith appears to warrant its being protected in its location. The court finds that appellant's contemplated extension cannot be made and operated by reason of respondent's boom. The two cannot exist together. It follows that respondent is unwarrantably interfering with appellant's location, and that in its booming operations the former must be restricted to territory outside of the latter's location.

We think the court erred in its conclusions of law. The judgment is, therefore, reversed and the cause remanded with instructions to make conclusions of law and enter judgment in accordance with what has been herein said.

HADLEY, *J.*

We concur:
MOUNT, *C. J.*
ROOT, *J.*
CROW, *J.*
DUNBAR, *J.*
RUDKIN, *J.*

636 In the Supreme Court of the State of Washington, Wednesday, December 6th, 1905.

No. 5336.

NICOMEN BOOM COMPANY, Appellant,
vs.
NORTH SHORE BOOM & DRIVING CO., Respondent.

Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the superior court of Pacific county, and upon the argument of counsel, and the court having fully considered the same and being fully advised in the premises and having filed its opinion in writing, it is now on the 6th day of December A. D. 1905, on motion of W. W. Cotton, Esq., of counsel for appellant, considered, adjudged and decreed that the judgment of the said superior court be, and the same is hereby, reversed with costs, the petition for rehearing denied, and that the said Nicomen Boom Company have and recover of and from the said North Shore Boom & Driving Company the costs of this action taxed and allowed at three hundred & thirteen & 20/100 dollars, and that execution issue therefor. And it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance with the opinion herein filed.

382 In the Supreme Court, State of Washington.

No. 5336.

NICOMEN BOOM COMPANY, Appellant,
v.
NORTH SHORE BOOM AND DRIVING COMPANY, Respondent.

Petition for Rehearing.

The respondent respectfully petitions that a rehearing in this cause be granted, and that an oral argument be permitted upon the merits of the cause, and submits in support thereof the following:

1. The decision of this court assumes that the Nicomen Boom Company intended at some future time to occupy and use the area in dispute. No issue of intention was in issue in the trial court, and this respondent was denied the right to offer evidence in rebuttal of such alleged intention.

2. The court assumes that future necessity might require the use of the disputed area by the Nicomen Boom Company. No issue of future necessity was raised by the pleadings, nor was this respondent permitted to offer evidence thereon.

3. The necessary result of the court's decision is to authorize a monopoly by the first boom company platting navigable waters, and the boom statute so construed is void, because in violation of our constitutional provision against the granting of exclusive rights and the conferring of a monopoly.

4. The legal effect of filing a boom plat should be determined by the constructions reasonably given to the boom statute, and not by resort to any supposed analogy between the filing of such a plat and the filing of a railroad plat of location.

5. In any event the respondent has expended a large sum of money, at this time about $20,000, and the rights of every
383 logger upon North river are seriously affected and jeopardized by the decision, which virtually excludes competition and prevents the respondent company from fulfilling its contractual obligations with the several persons and companies operating logging camps. Should the court finally decide that the North Shore boom is an infringement upon the rights of the Nicomen company, permission is respectfully asked to stay the operation of a mandatory injunction so that condemnation proceedings can be maintained and the large amount of money invested be not lost, and thereby in addition securing to the public the rights of competition.

Argument.

Under proposition 1 attention is called to the issues presented by the pleadings. The complaint in substance alleges that on a certain date this respondent commenced to build a boom within a few feet of the Nicomen boom, in such a way as to entirely prevent the use of said Nicomen boom. The Nicomen company in its complaint and at the trial took the position, not that it intended in the future as necessity required to use the area in dispute, but that it was actually using said area. It thus came into court basing its contention and right upon a falsehood. It failed to deal frankly with the court, and this of itself is ground for denying it relief in equity.

Verga *v.* Miller, 15 Atl., 835 (N. Y.).

An inspection of the complaint will show that no question of intention to use is presented thereby. But at the trial the Nicomen company, after making an effort for one or two days to show that it was in actual possession and using the disputed area, shifted its position and then claimed that it intended to use such disputed area. No amendment was made to the complaint, and this respondent objected to the introduction of any evidence upon the question of intention. The trial court, however, although stating that such evidence was, in his judgment, immaterial, permitted the Nicomen company to show its intentions. This evidence consisted of
384 alleged conversations between the various stockholders and officers of the company, and evidence that it attempted to get some piling, and that its pile driver was out of repair, thus necessitating delay. (See Testimony of McGowan, Statement of Facts, 118. Also 166, 167.) The trial court frequently intimated that

such testimony was immaterial. Thus, as bearing on the question of intention, the court held that the original cost of the boom was immaterial. (Statement, 130.) This respondent was also refused the right to show that the true purpose was to avoid competition by preventing another boom being built. (Statement, 135.) The fact that the piling which the Nicomen company attempted to drive upon its alleged extension was only trap piling and rediculously inadequate for boom purposes, the trial court held was immaterial. (Statement, 166, 167.)

The trial court also refused respondent the right to cross-examine M. Linn, manager of the Nicomen company, respecting the sudden and unwonted activity of the Nicomen company as soon as it learned that this respondent was entering the field as a competitor. (Statement, 169, 170.) Also as bearing on the question of intention and question of necessity for extension, the court held that the use of McGowan slough, which was also covered by the plat of the Nicomen company, was immaterial. (Statement, 205, 206.) Again, when this respondent's counsel attempted to cross-examine in order to ascertain whether the alleged intention and contemplated extension of the Nicomen boom were *bona fide* or merely colorable, and for the purpose of serving as the basis for this action, the trial court held that such cross-examination was improper and to no purpose. (Statement, 224.) Throughout the whole of plaintiff's case it is apparent that the trial court considered that an intention to occupy the disputed area on the part of the Nicomen company was immaterial, and that the case should be decided by ascertaining which company actually occupied and used the area first.

Since from the court's standpoint evidence of the Nicomen company's intention was immaterial, the court, when this respondent introduced evidence in defense of its position, repeatedly
385 refused to allow this respondent to show that the Nicomen company never actually intended to use the area in dispute. The court said the question of intention was reserved, and that respondent was consuming unnecessary time in going into what the plaintiff had done since suit was brought, (Statement, 248,) and when we attempted to show that the piling which the Nicomen company was seeking to use for its alleged extension were no more suitable for a boom structure than tooth picks would be, thus going directly to the question of *bona fide* intention, the court said he did not regard it as important enough to take up the time of the court. (Statement, 249, 250.)

As bearing upon the issue of intention and of good faith, and for the purpose of showing that the blanket plat of the Nicomen company was intended merely to exclude competition and give it a monopoly, this respondent sought to show that all the available boom area of North river had been platted by the Nicomen company, and the trial court held that this was immaterial and declined to receive evidence upon the point. (Statement, 334.) Again, as showing that the alleged proposed extension of the Nicomen company was only a sham and colorable, we sought to show the kind of piling ordinarily used for boom purposes; the court held the same to be im-

material. (Statement, 352, 353.) The court also held that proof of the date of ordering piling for said alleged extension was immaterial, and would not let us go into the matter. (Statement, 330.) As showing that the Nicomen company never had a *bona fide* intention of making its alleged extension, we offered evidence showing that when it commenced to drive piling in the disputed area, over a mile above its boom as actually operated, its manager intimated that the same was done for the same purpose as fish traps are "corked." (Statement, 275, 441.)

Again, as bearing upon the *bona fides* of said alleged intention and on the question of future necessity, this respondent claimed the right to show the output of logs in North river. The trial court held the same to be immaterial, and declined to allow us to offer evidence upon that point. (Statement, 365, 366, 387.)

386 Again, when this company offered evidence that it had a contract with every logger upon North river to boom his logs, the trial court held the same to be immaterial, (Statement, 366,) although it had direct and vital connection with the issue of whether there was any future necessity on the part of the Nicomen company. Again, as bearing on the question of intention, of good faith, of whether the Nicomen company sought a monopoly, we attempted to offer evidence showing what the rates charged by the Nicomen company were, and what this company proposed to charge, the court excluded said evidence. (Statement, 369.) And when we offered to show that McGowan asserted that he had a large boom and was getting only a few logs, which bore upon the question of future necessity and intention to extend, the trial court excluded such evidence and held that it was of no importance. (Statement, 372, 373.) We also offered evidence that the Nicomen company had declined to receive or take logs within its plant limits above its boom as actually constructed. The trial court held the same to be immaterial, (Statement, 408,) although it tended to show a disclaimer of right or jurisdiction over the area in dispute, and impliedly tended to rebut the present contention that an extension was contemplated; and we were refused the opportunity of showing that the Nicomen company had a large available storage ground within its plant limits in McGowan slough. (Statement, 409.)

It thus appears that, although the Nicomen company was permitted to offer evidence of asserted intentions, yet this respondent was not allowed to rebut the same; this being for the reason that the trial court thought the question of intention was unimportant, and besides was not in issue. But in its opinion and findings the trial court, probably overlooking the foregoing facts, found that the Nicomen company at all times intended to use the disputed area as necessity required. Had the trial court considered this the turning point of the case, as this court apparently considers it, doubtless this respondent would have been permitted to have made his defense. We thus find ourselves in the peculiar position of having this court decide the case upon an alleged fact found by the trial court

387 on which we were refused the right to offer evidence. Should this court adhere to its opinion as to the legal effect of filing

a plat, we respectfully request that the case be sent back for new trial, so that we may have an opportunity of meeting and resisting the issue of intention and future necessity. On these alleged facts we have never had our day in court.

The trial court refused to allow us to show that the Nicomen company had platted all the available boom area of North river, (Statement, 334,) and this court has intimated in its opinion that the particular effect of conferring a monopoly of the booming business upon the Nicomen company is not here for consideration; and this court gives as a reason that the legislature has wisely provided against oppressive monopoly by limiting the maximum charge that may be made by a boom company to seventy-five cents per thousand feet. This court further suggests that the Nicomen company has never charged over sixty cents. Hence, there is no oppressive monopoly.

Whether sixty cents is an oppressive charge or not is not shown by the record, and we were deprived of the opportunity of making such a showing. The public has a right to competition. The constitution does not authorize a monopoly merely because the same is not oppressive. The constitution forbids the legislature granting a monopoly or exclusive right, but this court by its decision apparently considers that a limitation of the rate which a public servant corporation may charge is all that is intended by the constitution. Whether sixty cents is oppressive or reasonable as a boom charge does not determine the question. If there be only one boom company on a river, the delay in handling logs may be of vastly more importance to loggers than the rate charged. The safety of the logs, their immunity from loss, is often a very important factor, and if competition can be excluded at the option of the first company locating on a river, then those engaged in the logging industry are denied that protection which the constitution guarantees.

388 It is fundamental that the granting of a franchise is strictly construed in favor of the state and the public, and against the grantee. This court, it seems to us, has reversed this salutary rule of construction.

This court justly recognizes that, where there is only one available boom site on a river, then Nature and not the law is responsible for the monopoly of boom rights thus conferred. A different question is presented, however, in this case, for here we were denied the right to show that there was another available site; that the same was locked up by the mere filing of a plat.

Perhaps we should apologize to the court for again calling attention to the fact that the boom statute does not purport to grant an exclusive boom franchise to the first locator. True, it does not limit the area which can be embraced in a boom plat; but if this failure is to be construed as conferring upon the first boom company the right to plat all the area available for boom purposes upon a river, whether it uses the same or not, then to this extent the statute conflicts with the constitution in that it authorizes the acquisition of an exclusive right and is in effect a monopoly. Indeed, this court in its decision has suggested that the legislature intended to protect prior locators

who have in good faith established their locations. The court thus admits that the question of good faith is vital and a proper subject for consideration. Surely, as bearing on the question of good faith in filing a blanket plat, evidence is proper to show that the true design was merely to prevent competition by locking up the unused portion of the platted territory. The court recognizes this in the following language:

"It is possible for a booming company in an effort to hold an entire stream to spread its plat of location over the whole available booming space thereon. If such were the manifest or apparent purpose, without regard to reasonable present and future necessities, it would be an attempted fraud against the state and the public which could not be upheld. Such a purpose does not appear on the part of appellant. Sufficient good faith appears to warrant its being protected in its location."

Again, we insist that we were not permitted to show the
389 lack of good faith in this regard.

A question of great public interest and importance is involved in this case. The public desires competition, and the logging industry will be greatly benefited thereby. The logging and lumbering industry is the great and paramount industry in Western Washington. The construction which this court has placed upon the boom statute tends inevitably to monopoly, and authorizes the prior logging boom company upon any river the right to plat as much as it pleases, and, if it desires, all the available boom area. Intentions are cheap, and in this case the Nicomen company can, with no expense to itself, *intend* to use the disputed area. An intention is a convenient subterfuge. It is hard to disprove intentions which are locked up in the breast of the manager of a corporation. It seems to us the decision of this court is to make the Nicomen boom company the judge of its own rights, and allow its avarice to decide whether it shall have a competitor or not.

The Nicomen company did not pretend to show, nor did the trial court find, that there would ever be any necessity whatever for the use by the Nicomen company of the disputed boom area. If this court will scan the statement of facts, it will find that the Nicomen boom company knew nothing whatever of the probable future output of logs in North River. None of its officers ever talked with any logger operating on the river, about the output. This court has assumed that there is a future necessity, although no claim to that effect was made in the complaint or at the trial.

This court has decided this case upon the supposed analogy existing between the filing of boom plats and the filing of railroad plats of location, and suggests that the legislature intended to furnish such an analogy by enacting § 4378 of 1 Bal. This section provides that boom companies may condemn in the manner provided by law for the appropriation of private property by railways. There is no statute specially providing the manner in which railway corporations
shall condemn. Besides, the statute in this respect, is repealed
390 by necessary implication by 1 Bal. § 4388, which provides for appropriation by boom companies in the manner provided

for by the general statute authorizing the condemnation of property by public service corporations. 2 Bal. § 5637. Hence, it cannot be said the legislature intended any analogy.

We think the boom statute is complete in itself, and that a reasonable construction supports our contention. The statute does not limit the area which may be platted: (1 Bal. §§ 4379, 4389;) but it does limit the exercise of the right of eminent domain to what is necessary. (1 Bal. § 4388.) By implication this limits the scope of a boom plat to the area which is necessary, for if a boom company cannot condemn tide or shore lands which are not necessary to its use, of what avail is it that it plat the same, unless it be, as in this instance, to exclude competition? Again, the court, it seems to us, has construed the purpose of the statute in authorizing a reversion of condemned property, as though the public had no interest at stake, and that the only interest to be subserved was that of the former owner. We think we see in this statute a legislative purpose to prevent the condemnation and holding of boom property without using the same. Probably it would be a matter of little concern to the former owner of the property condemned whether it was used or not; but it might be a matter of most vital concern to the public and to the loggers and to a competing boom company. In any event, the statute aims at the ceasing to use condemned property for boom purposes. The phrase "cease to use" is construed by this court to involve, first, a prior use, and second, an abandonment of that use. This may be good logic, but we feel it is sacrificing the spirit to the letter.

Ever since the trial below this respondent has operated its boom. The record shows that at the time of the trial it sought to prove that it had a contract with every logger on North river to boom his output. The decision of this court vitiates every such contract, and while we do not claim that the existence of such contract is determinative of this case, yet the effect upon the public welfare and the logging industry is a factor which we think a court of equity
391 should consider. The effect of the court's decision is not merely to destroy property costing many thousands of dollars, but at this season of the year it affects the entire logging industry upon North river, and many innocent persons engaged therein who have conducted their business in reliance upon the right of this company to do business. In this equitable case these considerations should be given weight, and even though the court should not consider them sufficient to deny the Nicomen company relief, yet we submit they should be considered in determining as to the character of that relief. The Nicomen company is the lower boom. Its sheer or upper end has always been upon the tide lands owned by this respondent and its grantors. It cannot extend its boom up the river upon the disputed area one foot without continuing and increasing that trespass. In so far as this action was brought to displace the North Shore company and allow the Nicomen company to use the disputed area, relief should be denied for the simple reason that to thus allow the Nicomen company to use said area is to allow it to trespass on the North Shore company's tide lands.

The evidence shows that the North Shore company expended about $10,000 up to the time of trial in building its boom. We would like permission to offer evidence that we have spent that much more since the decision, and that, should a mandatory injunction finally be granted, property of the value of $20,000 will be wiped out of existence. Since this company is also a public service corporation, and the rights of the public are involved in the operation of its business, should this court finally decide that in entering upon the disputed area we were without right and infringed upon the rights of the Nicomen company, and since it is very clear that our boom was built and our money expended in good faith, under the honest belief that we were within our legal rights, we ask either that in this action, since the trial court found that we were solvent, the amount of damages sustained by the Nicomen company on account of our taking or using any of its rights be assessed, and a mandatory injunction granted only upon our failure to pay such damages; or that a mandatory injunction be stayed pending condemnation proceed-
392 ings on our part.

Although in form an injunctive action, in legal effect it is an ejectment suit. Ejectment, it has frequently been held, will not lie against a public service corporation such as a railroad, on account of the disturbance to the public interests, and where ejectment is maintained the courts invariably sustain any judgment which may be rendered for the right to enforce the same until condemnation proceedings can be had. This court has so decided.

Hathaway *v.* Yakima Water Co., 14 Wash. 469;
Slaght *v.* Northern Pacific R. Co., 81 Pac. 1063;
Patterson *v.* Kamlah, 6 Atl. 444;
Kincaid, ——, 24 N. E. 1067.

In the case of Osborne *v.* Missouri Pacific R. R. Co., 37 Fed. 830, where the railway company commenced to build a track upon a street, and the abutting owner applied for an injunction, and pending the suit the track was laid and in daily use, the court held that an injunction would be denied and the complainant would be left to his remedy at law. This decision was affirmed by the federal supreme court. 147 U. S. 248.

This court as a court of equity has the right to take hold of the case and finally end the controversy by securing the payment of adequate compensation to the Nicomen company. A strong case, where the authorities are collated upon this proposition, is that of New York City *v.* Pine, 185 U. S. 93, *et seq.*

This court has recognized that, where the party can be compensated in damages and thus obviate the destruction of property, the party will be left to his remedy at law.

State *ex rel.* Smith *v.* Superior Court, 26 Wash. 291.

Again, by bringing this suit to enjoin the North Shore company, the Nicomen company thereby waived its right to a jury trial to assess the amount of damages, and this court has jurisdiction to determine the entire controversy; and should we ultimately fail to establish

our right to the disputed boom area, we ask the court, either to
393 remand this action for the purpose of having damages assessed by the trial court, or for a stay of mandatory injunction until condemnation proceedings can be waged. That this injunction suit was a waiver of a right to jury trial in a condemnation proceeding is held in the following cases:

Westphal *v.* City of New York, 78 N. Y. Supp. 56;
Sentenis *v.* Ladew, 35 N. E. 650.

The respondent respectfully requests that, upon the merits of this case for the purpose of presenting more fully the question of the legal effect of filing a boom plat, a rehearing be ordered and oral argument permitted.

Respectfully submitted,

W. H. ABEL,
Attorney for Respondent.

394 5336.

Filed Apr. 26, 1907. C. S. REINHART, *Clerk.*

395 In the Supreme Court of the State of Washington.

NICOMEN BOOM COMPANY, Plaintiff and Appellant,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant and Respondent.

Transcript.

In Appeal from Pacific County, Washington.

W. H. Abel and Chas. E. Miller, Attorneys for Defendant and Respondent.

Welsh & Welsh, Attorneys for Plaintiff and Appellant.

396 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM COMPANY, Plaintiff,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant.

Index.

Citation in Error	Pages	16		
Service on	"	17		
Conclusions of law	"	3	to	7
Judgment and Decree	"	8	"	12
Mandate from Supreme Court	"	1	"	2
Praecepi for Transcript	"	24		
Supersedeas	"	21		
Service on	"	22	"	23
Supersedeas Bond	"	18	"	19
Service on	"	20		
Writ of Error from United States Supreme Court	"	14	"	15
Clerk's Certificate		25		

397 In the Supreme Court of the State of Washington, October Session, A. D. 1905.

Be It Remembered, That at a regular session of the Supreme Court of the State of Washington begun and holden at Olympia on the second Monday in October, A. D. 1905, it being the 9th day of said month, among other, the following was had and done, to-wit.

WEDNESDAY, *Dec. 6th,* 1905.

No. 5336.

NICOMEN BOOM COMPANY, Appellant,
vs.
NORTH SHORE BOOM AND DRIVING COMPANY, Respondent.

Judgment.

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Pacific County, and upon the argument of counsel, and the Court having fully considered the same, and being fully advised in the premises, and having filed its opinion in writing, it is now, on this 6th day of December A. D. 1905 on motion of W. W. Cotton, Esquire, of counsel for appellant, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby reversed with costs; The petition for rehearing denied, and the said Nicomen Boom Company have and recover of the said North Shore Boom and Driving Company the costs of this action taxed and allowed at Three Hundred & Thirteen & 20/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance with the opinion herein filed.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, do hereby certify that the foregoing is a true copy of the Judgment and Decree in said cause, as the same now remains of record in my office.

In Testimony Whereof, I have hereunto set my hand affixed the seal of said Court at Olympia, this 6th day of December A. D. 1905.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk of the Supreme Court, State of Washington.

Filed Dec. 8, 1905.
E. A. SEABORG,
County Clerk.

Recorded by
C. M. SEABORG, *Deputy.*

398 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM CO. (a Corporation), Plaintiff,
vs.
NORTH SHORE BOOM & DRIVING COMPANY (a Corporation), Defendant.

Conclusions of Law.

The above entitled action came on regularly for hearing in open court upon the motion of the plaintiff asking the court to make and enter conclusions of law and a judgment in said action in accordance with the judgment, decision and mandate of the Supreme Court of the State of Washington in said cause.

The plaintiff appearing by W. W. Cotton, James G. Wilson, Welsh Bros. and W. B. Stratton, as its attorneys, and the defendant appearing by W. H. Abel and Hewen & Miller as its attorneys. The said motion was argued by the said attorneys for plaintiff in behalf of plaintiff and by the attorneys for the defendant on behalf of the defendant, and after argument of counsel and the court being fully advised in the premises, and it appearing to the court that heretofore an appeal was taken from this court from the final judgment of this court, which judgment was signed on the 10th. day of March, 1904, and filed in said action in the above named Superior Court, on the 12th. day of March, 1904, and the Court finds that the Supreme Court of the State of Washington on said appeal, did reverse said judgment of the Superior Court heretofore made and entered in the above entitled action, and said Supreme Court of the State of Washington in reversing said judgment, did order in its judgment and decision that the above entitled cause be remanded with instructions to this court to
399 make conclusions of law and enter judgment in accordance with the decision, opinion and mandate of said Supreme Court of the State of Washington, and this court finds from the records herein that said judgment and decision of said Supreme Court of the State of Washington, and the remittitur has been sent down by the Supreme Court of the State of Washington to this court, and the same are now on file and of record herein; and this court is ordered and directed to enter conclusions of law and a judgment herein in accordance with the judgment, decision and mandate of said Supreme Court of the State of Washington.

Now therefore, by reason of the said judgment, decision and mandate of said Supreme Court of the State of Washington, and pursuant to the law, it is hereby considered, ordered, adjudged and decreed that the conclusions of law, being the conclusions of law No-. 1, 2, 3 and 4 which were made and entered on the findings of fact in said cause, by this court on the 12th day of March 1904, be and they and each of them are hereby vacated, set aside and held for naught, and

It is further considered, ordered, adjudged and decreed that on said findings of fact heretofore made and found by this court, that the following conclusions of law be, and the same are hereby found and made:

1.

That plaintiff has a valid and subsisting and prior location for the catching, booming, rafting, sorting and holding of logs, lumber and other timber products, and for the construction, maintenance and operation of its boom on North River, in Pacific County, Washington, and on the waters and shore lines and lands contiguous to said North River and territory of said North River as shown by its plat and survey of location which was filed with the sec-
400 retary of the State of Washington on April 5th, 1900, a copy of which plat and survey was attached to plaintiff's complaint, marked Exhibit "A" and was made a part thereof, and which plat and survey showed the waters and shore lines of said North River and the lands contiguous thereto which plaintiff proposed to appropriate for its boom and booming operations in said North River, and which location of said plaintiff is described as follows, to-wit:

All that portion of North River lying and being in Pacific County, Washington, and more particularly described as follows, to-wit: Commencing at the mouth of North River in Section 26, township fifteen, North of Range Ten. West of Willamette Meridian, and thence running up said river and on and along the meanders thereof on both banks thereof and included between said meanders and the shore lines of the waters and all waters and lands contiguous thereto, and river bed of said North River to a point where said North River intersects the North line of Section twenty three, township 15 North Range Ten. West Willamette Meridian, all being situated in Pacific County, Washington.

Also all those certain tide lands of the second class situated in front of and abutting upon lots 5, 6 and 7 of section 23; and lots 5, 6 and 7 of Section 22; and lots 5 and 6 of Section 27; and lots 1, 2, 3 and 5 of the Amos Smith Donation Land Claim in Section 26, all in township 15 North of Range 10 West of Willamette Meridian in Pacific County, Washington.

2.

That plaintiff has a prior and lawful right to construct, maintain and operate its boom on said North River on all of plaintiff's said location, described in conclusions of law No. 1 hereof, and also upon the tide lands of the second class therein described.

3.

That defendant's boom as constructed, and as now located
401 on said North River in Pacific County, Washington unwarrantably and unlawfully interferes with plaintiff's said location on said North River, and defendant's boom is an unlawful structure. That defendant has no right whatever to erect, maintain, keep or operate any boom whatever on plaintiff's said location

nor on any part of plaintiff's said location, and that the defendant, in any boom or in any booming operations, be restricted to territory outside of plaintiff's aforesaid location, including plantiff's said tide lands described in conclusion of law No. 1 hereof.

4.

That defendant be perpetually and forever enjoined, restrained and prohibited from driving any piles, timbers or any other structure whatever in said North River in Pacific County, Washington, upon plaintiff's aforesaid location, and tide lands which are described in conclusion of law No. 1 hereof; and that defendant be perpetually and forever enjoined, restrained and prohibited from erecting, maintaining and operating any boom or other structure whatever on the aforesaid location of plaintiff in said North River, and from interfering with plaintiff's boom or booming works in any manner whatever in said North River, or the location of plaintiff aforesaid on said North River.

5.

That the plaintiff has a right to make and construct its proposed extension of its boom on said North River and to extend the same throughout and on all of its said location, and its tide lands described in conclusion of law No. one hereof.

6.

That the defendant has no right to maintain or operate that certain boom heretofore constructed by defendant on the aforesaid location of plaintiff.

7.

That plaintiff is entitled to a judgment and decree of this
402 court compelling the defendant to immediately open said boom and to immediately begin to take up and remove that certain boom which it heretofore constructed in North River, Pacific County, Washington, and also all piling, timbers and other structure which defendant heretofore erected and constructed on plaintiff's aforesaid location in North River, in Pacific County, Washington, and that said removal shall be fully completed within three weeks from date, and that plaintiff is entitled to a judgment for its costs and disbursements in this action.

To all of which defendant excepts and its excepton is allowed.

Done in open court this 16th. day of January, 1906.

ARTHUR E. GRIFFIN, *Judge.*

Service of the foregoing conclusions of law are admitted this Sixteenth day of January, 1906.

W. H. ABEL,
Attorney for Defendant.

[Endorsed:] Filed Jan. 16, 1906. E. A. Seaborg County Clerk. Recorded Court Journal Vol. 12 pages 4, 5, 6 and 7.

403 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM CO. (a Corporation), Plaintiff,
vs.
NORTH SHORE BOOM & DRIVING COMPANY (a Corporation), Defendant.

Judgment and Decree.

The above entitled action came on regularly for hearing in open court upon the motion of the plaintiff asking the court to make and enter conclusions of law and a judgment in said action in accordance with the Judgment, decision and mandate of the Supreme Court of the State of Washington in said cause.

The plaintiff appearing by W. W. Cotton, James G. Wilson, Welsh Bros. and W. B. Stratton, as its attorneys, and the defendant appearing by W. H. Abel and Hewen & Miller as its attorneys. The said motion was argued by the said attorneys for plaintiff in behalf of plaintiff and by the attorneys for the defendant on behalf of the defendant, and after argument of counsel and the court being fully advised in the premises, and it appearing to the court that heretofore an appeal was taken from this court from the final judgment of this court, which judgment was signed on the 10th. day of March, 1904, and filed in said action in the above named Superior Court, on the 12th. day of March, 1904, and the court finds that the Supreme Court of the State of Washington on said appeal, did reverse said judgment of the Superior Court heretofore made and entered in the above entitled action, and said Supreme Court of the State of Washington in reversing said judgment, did order in its judgment and decision that the above entitled cause be remanded with instructions to this
404 court to make conclusions of law and enter judgment in accordance with the decision, opinion and mandate of said Supreme Court of the State of Washington, and this court finds from the records herein that said judgment and decision of said Supreme Court of the State of Washington, and the remittitur have been sent down by the Supreme Court of the State of Washington to this court, and the same are now on file and of record herein; and this court is ordered and directed to enter conclusions of law and a judgment herein in accordance with the judgment, decision and mandate of said Supreme Court of the State of Washington, and this court, by reason of said judgment, decision and mandate of said Supreme Court of the State of Washington, and pursuant to the law, did on this date make and enter herein its conclusions of law in accordance with said judgment, decision and mandate of said Supreme Court,

Now therefore, it is hereby considered, ordered, adjudged and decreed that plaintiff has a valid and subsisting and prior location for the catching, booming, rafting, sorting and holding of logs, lumber and other timber products, and for the construction, maintenance and operation of its boom on North River, in Pacific County, Wash-

ington, and on the waters and shore lines and lands contiguous to said North River and territory of said North River as shown by its plat and survey of location which was filed with the secretary of the State of Washington on April 5th, 1900, a copy of which plat and survey was attached to plaintiff's complaint, marked Exhibit "A" and was made a part thereof, and which plat and survey showed the waters and shore lines of said North River and the lands contiguous thereto which plaintiff proposed to appropriate for its boom and booming operations in said North River, and a certified copy of said plat as filed in the office of the secretary of State aforesaid was on this day filed in the office of the clerk of this court as is hereby referred to, and said location of said plaintiff is described as follows, to-wit:

All that portion of North River lying and being in Pacific County, Washington, and more particularly described as follows, to-wit:

405 Commencing at the mouth of North River in Section twenty-six, township fifteen, North of Range Ten, West of Willamette Meridian, and thence running up said river and on and along the meanders thereof on both banks thereof, and included between said meanders and the shore lines of the waters and all waters and lands contiguous thereto, and river bed of said North River to a point where said North River intersects the North line of Section twenty-three, township fifteen, North of Range Ten, West Willamette Meridian, all being situated in Pacific County, Washington.

Also all those certain tide lands of the second class situated in front of and abutting upon lots 5, 6 and 7 of section 23; and lots 5, 6 and 7 of Section 22; and lots 5 and 6 of Section 27; and lots 1, 2, 3 and 5 and the Amos Smith Donation Land Claim in Section 26, all in township 15 North of Range 10 West of Willamette Meridian, In Pacific County, Washington.

It is further considered, ordered, adjudged and decreed that plaintiff has a prior and lawful right to construct, maintain and operate its boom on said North River on all of plaintiff's said location, which location is hereinabove in this judgment particularly described.

It is further considered, ordered, adjudged and decreed that defendant's boom as constructed and as now located on said North River in Pacific County, Washington, unwarrantably interferes with plaintiff's said location on said North River, which location is hereinabove in this judgment particularly described, and defendant's boom is an unlawful structure. That defendant has no right whatever to erect, maintain, keep or operate any boom whatever on plaintiff's said location hereinabove in this judgment particularly described, nor on any part of plaintiff's said location, and that the defendant, in any boom or booming operations on said North River, be restricted to

406 territory outside of plaintiff's aforesaid location including plaintiff's said tide lands of the second class hereinabove in this judgment particularly described.

It is further considered, ordered, adjudged and decreed that the defendant, its officers, agents, servants and employees and all persons acting in aid or assistance of them or by, through or under them be and they are forever enjoined, restrained and prohibited from driving

any piles, timbers or any other structure whatever in said North River, in Pacific County, Washington, upon the location and upon the tide lands of the plaintiff, which location and tide lands are hereinabove in this judgment particularly described, and that said defendant and persons be and they hereby are perpetually enjoined, restrained and prohibited from erecting, maintaining or operating any boom or other structure whatever on the aforesaid location of plaintiff in said North River, which is hereinabove in this judgment particularly described, and from interfering with plaintiff's boom or boom works in any manner whatever in said North River or on said location of plaintiff aforesaid in said North River.

It is further considered, ordered, adjudged and decreed that the plaintiff has a lawful right to make and construct its proposed extension of its boom on and in said North River in Pacific County, Washington, and to extend the same throughout and on all of its said location and tide lands, which location and tide lands are hereinbefore in this judgment particularly described.

It is further considered, ordered, adjudged and decreed that the defendant has no right to maintain or to operate that certain boom or boom structure heretofore constructed by it on the aforesaid location of plaintiff, which location is hereinabove in this judgment particularly described.

It is further considered, ordered, adjudged and decreed that the defendant be and it hereby is ordered, required and directed
407 to immediately open said boom and to immediately begin to take up and remove those certain pilings, timbers, boom or other structures and all other structures which defendant heretofore erected and constructed on plaintiff's location in North River, in Pacific County, Washington, and shall fully remove said boom and timbers within three weeks from this date, and which location of plaintiff is particularly described in that certain plat which is attached to said plaintiff's complaint marked Exhibit "A" and said certified copy of said plat filed in the office of the clerk of this court this day: and that plaintiff have and recover of and from defendant its costs and disbursements in the supreme court taxed at the sum of $313.20, and its costs and disbursements herein is this superior court taxed at the sum of $352.70.

It is further considered, ordered, adjudged and decreed that execution or other lawful writ may issue herein for the inforcement of this judgment in favor of the plaintiff and against the defendant. To all of which defendant excepts and its exception is allowed.

Done in open court this 16th. day of January, 1906.

ARTHUR E. GRIFFIN, *Judge.*

Service of said judgment, by copy, admitted this sixteenth day of Jan. 1906.

W. H. ABEL,
Of Attorneys for Defendant.

Filed Jan. 16, 1906.
E. A. SEABORG,
County Clerk.

Recorded Court Journal, Vol. 12, pages 8, 9, 10, 11.

408 In the Supreme Court of the State of Washington.

NICOMEN BOOM COMPANY, Plaintiff and Appellant,
vs.
NORTH SHORE BOOM & DRIVING CO., Defendant and Respondent.

Supersedeas.

I hereby certify that an appeal has been granted to the Supreme Court of the United States, returnable on Monday, March 19, 1906, from a judgment rendered in this court on the sixth day of December, A. D. 1905, in favor of the appellant, Nicomen Boom Company, and against the respondent, North Shore Boom & Driving Co., reversing the judgment and decree of the superior court of the State of Washington, in and for the County of Pacific, and directing a judgment and decree in favor of the appellant Nicomen Boom Company, in accordance with the prayer of its complaint, and that a supersedeas bond has been executed and filed within sixty days from the date of the said judgment and decree of this court.

Therefore, the appellant, Nicomen Boom Company, and all others are commanded to stay proceedings on said judgment and decree.

Witness my hand and the seal of said court, this nineteenth day of January, A. D. 1906.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

Filed Jan. 19, 1906.
E. A. SEABORG,
County Clerk.

Recorded, Court Journal, Vol. 12, page 13.

409 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Washington, before you, or some of you, being the highest court of law or equity of the said State in which decision could be had in the said suit between Nicomen Boom Company, Plaintiff and Appellant and North Shore Boom & Driving Company, defendant and Appellee, wherein was drawn the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against

the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Nicomen Boom Company, Plaintiff and Appellant, as by its complaint appears, we being — that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and
410 openly, you send the record and proceedings aforesaid, with — things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the twelfth day of May 1907, in the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the thirteenth day of March, A. D. 1907.

[Seal of the United States Circuit Court, Western District of Washington.]

A. REEVES AYERS,
Clerk of the United States Circuit Court for the Western District of Washington,
By SAM'L D. BRIDGES, *Deputy Clerk.*

Filed Mar. 18, 1907.
OREN C. WILSON, *Clerk.*

411 UNITED STATES OF AMERICA, *ss:*

To the Nicomen Boom Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty (60) days from the date hereof, pursuant to a Writ of Error, filed in the Clerk's office of the Supreme Court of the United States of Washington, wherein State of Washington *ex rel.* North Shore Boom & Driving Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the thirteenth day of March, A. D. 1907.

[Seal of the United States Circuit Court, Western District of Washington.]

A. REEVES AYRES,
Clerk of the United States Circuit Court for the Western District of Washington.

Filed Mar. 27, 1907.
OREN C. WILSON, *Clerk,*
By W. E. EDWARDS, *Deputy.*

412 *Sheriff's Return—Personal Service of Summons.*

STATE OF WASHINGTON, *County of Pacific, ss:*

I, A. B. McDonald, Sheriff of Pacific County, State of Washington, do hereby certify that I received the annexed citation in error on the 25th day of March 1907, and I personally served the same on the 26th day of March, 1907, on the Nicomen Boom Company a corporation, it being the defendant in error named therein, by delivering to and leaving with Henry S. McGowan the Secretary of the said Nicomen Boom Company personally, in said Pacific County a copy of said Citation in Error in the action named in said —.

Dated this 27th day of March, 1907.

A. B. McDONALD, *Sheriff,*
By T. H. STEPHENS, *Deputy.*

Sheriff's Fees.

Service	$.60.
Travel	12.00.
	12.60.

Filed Mar. 28, 1907.
OREN C. WILSON, *Clerk,*
By W. E. EDWARDS, *Deputy.*

413 In the Superior Court of the State of Washington for Pacific County.

NICOMEN BOOM COMPANY, Plaintiff and Appellant,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant and Respondent.

Supersedeas Bond.

Know all men by these presents that we, the North Shore Boom & Driving Company, as principal, and J. F. Hobi and J. W. Kleeb as sureties, are held and firmly bound unto the Nicomen Boom Company, in the sum of Twenty Thousand ($20,000) Dollars, lawful money of the United States, to be paid to the said Nicomen Boom Company, or to its certain attorneys, successors and assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, and each of them firmly by these presents.

Sealed with our seals and dated this 13th day of March A. D. 1907.

Whereas, the above named North Shore Boom & Driving Company, hath prosecuted a writ of error in the Supreme Court of the United States to reverse the final judgment and decree of the Superior Court of the State of Washington in and for the County of

Pacific, rendered and entered on the Sixteenth day of January, A. D. 1906, by virtue of the mandate of the Supreme Court of the State of Washington, dated December 6th, A. D. 1905 in the above entitled action.

Now the condition of this obligation is such that if the said North Shore Boom & Driving Company shall diligently prosecute its said writ of error to effect, and, if it fail to make its pleas good, shall answer all damages and costs, and shall do all things enjoined upon it by the said Supreme Court of the United States, then this obligation to be void; otherwise in full force and effect.

NORTH SHORE BOOM & DRIVING COMPANY,
By J. W. KLEEB, *President.*
J. F. HOBI.
J. W. KLEEB.

414 STATE OF WASHINGTON, *County of Pacific, ss:*

J. F. Hobi and J. W. Kleeb, being duly sworn, according to law, each for himself and not one for the other, on his oath deposes and says:

That he is a resident and freeholder within the State of Washington; that he is worth more than double the sum of twenty thousand dollars, over and above all his debts and liabilities in property situated within the state of Washington which is not exempt from sale on execution.

J. F. HOBI.
J. W. KLEEB.

Subscribed and sworn to before me this 13th day of March, A. D. 1907.

[Notarial Seal of Chas. E. Miller.]

CHAS. E. MILLER,
Notary Public in and for the State of Washington, Residing at South Bend, Washington.

I do hereby approve the above supersedeas bond.

HIRAM E. HADLEY,
Chief Justice of the Supreme Court of the State of Washington.

Dated Olympia, Wash., March 16th A. D. 1907.

Filed Mar. 18 1907.
OREN C. WILSON, *Clerk.*

415 *Sheriff's Return—Personal Service of Summons.*

STATE OF WASHINGTON, *County of Pacific, ss:*

I, A. B. McDonald, Sheriff of Pacific County, State of Washington, do hereby certify that I received the annexed Supersedeas Bond on the 25th day of March 1907, and personally served the same on the 26th day of March, 1907, on the Nicomen Boom Company, a corporation, it being the Plaintiff and appellant named

therein, by delivering to and leaving with Henry S. McGowan the Secretary of the said Nicomen Boom Company personally, in said Pacific County, a copy of said Supersedeas Bond in the action named in said —.

Dated this 27th day of March, 1907.

A. B. McDONALD, *Sheriff*,
By T. J. STEPHENS, *Deputy*.

Sheriff's Fees.

Service ..... $ 60
Travel .....

Filed Mar. 28 1907.
OREN C. WILSON, *Clerk*,
By W. E. EDWARDS, *Deputy*.

416 In the Supreme Court of the State of Washington.

NICOMEN BOOM COMPANY, Plaintiff and Appellant,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant and Respondent.

Supersedeas.

A petition for a writ of error having been granted to the Supreme Court of the United States, the said writ of error being returnable on the twelfth day of May A. D. 1907, from a judgment rendered in the Superior Court of the State of Washington, in and for the County of Pacific on the Sixteenth day of January, A. D. 1906, in obedience to the Mandate of the said Supreme Court of the State of Washington, issued on the sixth day of December A. D. 1905, in favor of the appellant, Nicomen Boom Company and against the respondent, North Shore Boom & Driving Company, reversing the former judgment and decree of the said Superior Court of the State of Washington, in and for the said County of Pacific, and directing a judgment and decree in favor of the appellant Nicomen Boom Company in accordance with the prayer of its complaint and the said respondent, North Shore Boom & Driving Company having executed and filed its supersedeas bond in the sum of twenty thousand dollars and the same having been by me approved,

Therefore, the appellant, Nicomen Boom Company and all others are commanded to stay proceedings on said judgment and decree.

Witness my hand this 20th day of March, A. D. 1907.

[Seal of the Supreme Court, State of Washington.]

HIRAM E. HADLEY,
Chief Justice of the Supreme Court of the State of Washington.

Attest:
C. S. REINHART,
Clerk of Said Court.

Filed Mar. 27 1907.
OREN C. WILSON, *Clerk*,
By W. E. EDWARDS, *Deputy*.

417 *Sheriff's Return—Personal Service of Summons.*

STATE OF WASHINGTON, *County of Pacific, ss:*

I, A. B. McDonald, Sheriff of Pacific County, State of Washington, do hereby certify that I received the annexed Supersedeas on the 25th day of March 1907, and personally served *that* same on the 26th day of March 1907, on the within named Nicomen Boom Company, a corporation being the plaintiff and appellant named therein, by delivering to and leaving with Henry S. McGowan the Secretary of the said Nicomen Boom Company personally, in said Pacific County a copy of said supersedeas in the action named in said —.

Dated this 27th day of March, 1907.

A. B. McDONALD, *Sheriff.*
T. J. STEPHENS, *Deputy.*

Sheriff's Fees.

Service	$ 60
Travel	

Filed Mar. 28 1907.
OREN C. WILSON, *Clerk,*
By W. E. EDWARDS, *Deputy.*

418 *Sheriff's Return—Personal Service of Summons.*

STATE OF WASHINGTON, *County of Pacific, ss:*

I, A. B. McDonald, Sheriff of Pacific County, State of Washington, do hereby certify that I received the annexed supersedeas on the 25th day of March 1907 and personally served the same on the 27th day of March 1907 on the Nicomen Boom Company, a corporation, it being the plaintiff named therein, by delivering to and leaving with Hon. John T. Welsh, one of its attorneys of record personally, in said Pacific County, a copy of said Supersedeas in the action named in said Supersedeas.

Dated this 28th day of March 1907.

A. B. McDONALD, *Sheriff.*

Sheriff's Fees.

Service	$ 60
Travel	20
	80

Filed Mar. 28 1907.
OREN C. WILSON, *Clerk,*
By W. E.EDWARDS, *Deputy.*

419 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM COMPANY, Plaintiff,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant.

Præcepi for Transcript.

To the Clerk of said Court:

You will please prepare a transcript of the proceedings had in the above entitled action since the 5th day of December, A. D. 1905, as shown by the various pleadings and proceedings, enumerated below and forward the same, duly certified by you to the Supreme Court of this State at Olympia, accompanying the same with the Writ of Error from the Supreme Court of the United States, filed in your office on the 19th day of January, A. D. 1907:—

1. Mandate from the Supreme Court, dated December 5, 1905.
2. Conclusions of law stated by Judge Griffin filed, January 16, 1905.
3. Judgment of Judge Griffin made on January 16, 1906.
4. Writ of Error from U. S. Supreme Court.
5. Citation in error and service.
6. Supersedeas Bond.
7. Supersedeas.

Dated, South Bend, Wash., April 23, 1907.

W. H. ABEL,
CHAS. E. MILLER,
Attorneys for Defendant.

Filed April 23, 1907.
OREN C. WILSON, *Clerk.*

420 In the Superior Court of the State of Washington in and for the County of Pacific.

NICOMEN BOOM COMPANY, Plaintiff,
vs.
NORTH SHORE BOOM & DRIVING COMPANY, Defendant.

Clerk's Certificate.

STATE OF WASHINGTON, *County of Pacific, ss:*

I, Oren C. Wilson, County Clerk and Clerk of the Superior Court of the State of Washington, in and for the County of Pacific, do hereby certify that the foregoing transcript of twenty-four typewritten pages, numbered from 1 to 24 inclusive, exhibits and contains full and correct copies of so much of the records and files now on file in this office, as were asked for by the attorneys for the defendant in the above entitled action, in the above entitled action.

In witness whereof, I have hereunto set my hand and affixed the seal of the above named court, this 24th day of April, 1907.

[SEAL.] OREN C. WILSON,
County Clerk and Clerk of the Superior Court of the State of Washington, for Pacific County.

Transcript Filed Apr. 24 1907.
OREN C. WILSON, *Clerk.*

421 In the Supreme Court of the State of Washington.

NICOMEN BOOM COMPANY, Plaintiff and Appellant,
vs.
NORTH SHORE BOOM AND DRIVING COMPANY, Defendant and Respondent.

Application for Writ of Error.

To the Honorable Hiram E. Hadley, Chief Justice of the Supreme Court of the State of Washington:

Your petitioner, the North Shore Boom and Driving Company, defendant and respondent in the above entitled cause, respectfully represents that on the 6th day of December A. D. 1905 a decree was made and entered in this court and cause remitting this cause to the Superior Court of Washington for Pacific County for further proceedings in accordance with the opinion filed herein; that pursuant to said remittitur on January 16, 1906 the said Superior Court of Washington for Pacific County made, rendered, and entered a final decree and judgment against your petitioner North Shore Boom and Driving Company and in favor of the above named Nicomen Boom Company, plaintiff and Appellant, in accordance with the prayer of its complaint, supplemental complaint and findings of fact made in said cause.

And your petitioner further represents that this action involves the question of the right on the part of your petitioner to construct a boom on a navigable river within the United States for the purpose of catching, sluicing, booming and rafting saw logs and other
422 timber products under the act of Congress of September 19, 1890, Chapter 907, (26 St. L. 426), and a permit thereunder from the Secretary of War, your petitioner's rights thereunder having been denied by said final decree and judgment; and also involving the right of the plaintiff Nicomen Boom Company to occupy the same territory and area of a navigable river within the United States for boom purposes under a permit issued under said act of Congress by the Secretary of War unto one, P. J. McGowan; and the assignability thereof to the Nicomen Boom Company.

Wherefore, your petitioner feeling aggrieved, hereby applies for a writ of error from said final decree and judgment, and from the whole thereof, unto the Supreme Court of the United States, and that said writ of error be allowed; and that a transcript of the records

of the proceedings and papers upon which said decree was founded, after due authentication, may be sent to the Supreme Court of the United States, that that honorable court may hear said cause anew and reverse said judgment; and that pending the hearing on said writ of error that a stay of proceedings on said final decree and judgment be granted.

NORTH SHORE BOOM & DRIVING CO.,
W. H. ABEL, *Attorney for Petitioner.*

423 It is now ordered that a writ of error be, and is hereby allowed, and ordered issued as prayed for; and that a stay of proceedings upon said final decree and judgment be, and is hereby granted, pending and until a final determination of said cause upon said writ of error; and the petitioner's bond to secure said stay is hereby fixed at the sum of Twenty Thousand ($20000) dollars.

Dated March 13th, 1907.

HIRAM E. HADLEY,
Chief Justice of the Supreme Court of the State of Washington.

Indorsed: Filed Mar. 13, 1907. C. S. Reinhart, Clerk.

[Endorsed:] Application for Writ of Error.

424 In the Supreme Court of the State of Washington.

STATE OF WASHINGTON *ex Rel.* NORTH SHORE BOOM & DRIVING COMPANY, Plaintiff in Error,
vs.
NICOMEN BOOM COMPANY, Defendant in Error.

Assignment of Errors.

Now comes the said plaintiff in error, and respectfully submits that in the record, proceedings, decision and final judgment of the supreme court of the State of Washington, in the above entitled matter, there is manifest error in this, to-wit:

1. For that the court erred in not finding and deciding that plaintiff in error had a good and valid permission from the Secretary of War to construct its said boom.

2. For that the court erred in finding and deciding that the defendant in error had a good and valid permission from the secretary of war to hold the territory occupied by the boom of plaintiff in error for its contingent future necessities.

3. For that the court erred in not finding and deciding that the permit and license granted by the secretary of war to plaintiff in error to construct its said boom operated as, and was a, revocation of the permit and license previously granted by the secretary of war to construct its said boom.

4. For that the court erred in finding and deciding that at the

time of the commencement of this action the defendant
425 in error was entitled to the possession of, and to hold, the entire area covered by its plat as filed in the office of the secretary of the state of Washington.

5. For that the court erred in finding and deciding that the defendant in error had a right prior to that of the plaintiffs in error, to the area covered by the said boom of plaintiff in error.

6. For that the court erred in not finding and deciding that the defendant in error appropriated only so much of the area included within its said plat as filed in the office of the secretary of the State of Washington, as was, at the time of the filing of the said plat of the plaintiff in error in the office of the secretary of the state of Washington, actually used and occupied by it the defendant in error, for boom purposes.

7. For that the court erred in not finding and deciding that the defendant in error appropriated so much, only of the area of the waters of the said North River as was in actual use by it for boom and rafting purposes at the time it completed its said boom.

8. For that the court erred in reversing the finding and judgment of the superior court of the state of Washington, in and for the county of Pacific.

9. For that the court erred in giving and entering its said judgment in favor of the defendant in error.

10. For that the court erred in giving and entering judgment impairing and violating the rights of the plaintiff in error, under the Fourteenth Amendment of the Constitution of the United States.

W. H. ABEL,
Attorney for Plaintiff in Error.

Indorsed: Filed Mar. 13, 1907. C. S. Reinhart, Clerk.
[Endorsed:] Assignment of Errors.

426 In the Supreme Court of the State of Washington.

NORTH SHORE BOOM AND DRIVING CO., Plaintiff in Error,

—.

NICOMEN BOOM CO., Defendant in Error.

To the Clerk of the Supreme Court of the State of Washington:

Please prepare certified transcript in the above entered case, containing the following files in said case, and transmitting same, so that the same be filed in the clerk's office of the U. S. of the Supreme Court, on or before May 12, 1907.

Complaint, answer, reply, su*bti*-mental complaint, answer to su*b*-mental complaint, reply to answer to su*bti*-mental complaint, findings of fact, conclusions of law, decree, defendant's proposed findings of fact, conclusions of law, defendant's explanations to finding of facts of law and judgment, notice of appeal and admission of service, bond on appeal, brief of North Shore Boom and Driving Co.,

opinion of the Supreme Court of the state of Washington, petition of rehearing filed by North Shore Boom and Driving Co., order denying petition for hearing, mandate to Superior Court of Pacific County, also record transmitted by Superior Court of Pacific County to the Supreme Court of Washington, also application for writ of error, order allowing writ of error by Chief Justice Hadley, assignment of error, writ of error, bond for *for* cost and supersedeo*us* bond, *s*itation, proof of service of *s*itation, order allowing supersedeo*us*, and copy of the precipe, the same to be duly certified under the seal of your office.

W. H. ABEL,
CHAS. E. MILLER,
Attorneys for Plaintiff in Error.

427 In the Supreme Court of the State of Washington.

NORTH SHORE BOOM & DRIVING COMPANY, Plaintiff in Error,
v.
NICOMEN BOOM COMPANY, Defendant in Error.

Clerk's Certificate.

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true, and correct transcript of the record in the above entitled cause, and that, in pursuance of the writ of error heretofore filed, in this cause, I herewith transmit the said transcript, together with the original citation and the original writ of error, to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Olympia this 4th day of May, 1907.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

428 *Defective Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Supreme Court of the State of Washington, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Nicomen Boom Company, Plaintiff and Appellant, and North Shore Boom & Driving Company, Defendant and Appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United

States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Nicomen Boom Company, Plaintiff and Appellant, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal,
429 distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the twelfth day of May, 1907, in the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the thirteenth day of March, A. D. 1907.

[Seal of the United States Circuit Court, Western District Washington.]

A. REEVES AYRES,
Clerk of the United States Circuit Court for the Western District of Washington.
By SAM'L D. BRIDGES,
Deputy Clerk.

429½ [Endorsed:] Case 1501. 5336. In the Superior Court of the State of Washington for Pacific County. Nicomen Boom Company Plaintiff *vs.* North Shore Boom & Driving Company, Defendant. (4) Filed Apr. 26 1907 C. S. Reinhart Clerk. Filed Mar. 18 1907 Oren C. Wilson Clerk.

429¾ *Sheriff's Return—Personal Service of Summons.*

STATE OF WASHINGTON, *County of Pacific, ss:*

I, A. B. McDonald, Sheriff of Pacific County, State of Washington, do hereby certify that I received the annexed Citation in Error on the 25th day of March 1907, and personally served the same on the 26th day of March, 1907, on the Nicomen Boom Company a corporation, it being the Defendant in Error named therein, by delivering to and leaving with Henry S. McGowan Secretary of the said Ni-

comen Boom Company personally, in said Pacific County a copy of said Citation in Error in the action named in said ——.

Dated this 27th day of March, 1907.

A. B. McDONALD, *Sheriff*,
By N. J. STEPHENS, *Deputy*.

Sheriff's Fees,

Service	$.60
Travel	$12.00
	12.60

[Endorsed:] Filed Mar. 28, 1907. Oren C. Wilson, By W. E. Edwards, Deputy.

UNITED STATES OF AMERICA, *ss:*

To the Nicomen Boom Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty (60) days from the date hereof, pursuant to a Writ of Error, filed in the Clerk's office of the Supreme Court of the State of Washington, wherein State of Washington, *ex rel.* North Shore Boom & Driving Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the thirteenth day of March A. D. 1907.

[Seal of the United States Circuit Court, Western District of Washington.]

A. REEVES AYRES,
Clerk of the United States Circuit Court for the Western District of Washington,
By —— ——, *Deputy Clerk*.

430 [Endorsed:] No. 1501. 5336. In the Supreme Court of the State of Washington. The Nicomen Boom Company, Plaintiff and Appellant, *vs.* North Shore Boom & Driving Company, Defendant and Respondent. Citation in Error to the U. S. Supreme Court. Filed Mar. 27, 1907. Oren C. Wilson, Clerk, by W. E. Edwards, Deputy. Filed May 3, 1907. C. S. Reinhart, Clerk.

431 *Add'l Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Washington before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Nicomen Boom Company, Plaintiff and Appellant and North Shore Boom and Driving Company, defendant and Appellee wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or
432 of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said North Shore Boom & Driving Company, defendant and Appellee as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within sixty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 13th day of March, in the year of our Lord one thousand nine hundred and seven.

[Seal of the United States Circuit Court, Western District of Washington.]

A. REEVES AYRES,
Clerk of the Circuit Court of the United States for the Western Dist. of Wash.

Allowed by
HIRAM E. HADLEY,
Chief Justice of the Supreme Court of the State of Washington.

[Endorsed:] 5336. Filed Jun- 10, 1907. C. S. Reinhart, Clerk.

POOR

433 *Copy of Add'l Citation.*

UNITED STATES OF AMERICA, *ss:*

To Nicomen Boom Company, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within Sixty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Washington wherein State of Washington *ex rel.* North Shore Boom & Driving Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Hiram E. Hadley, Chief Justice of the Supreme Court of the Washington State, this 13th day of March, in the year of our Lord one thousand nine hundred and seven.

HIRAM E. HADLEY,
Chief Justice of the Supreme Court of the State of Washington.

Indorsed: Deposited this 10th day of June, 1907. C. S. Reinhart, Clerk Supreme Court.

434 STATE OF WASHINGTON, *County of Thurston, ss:*

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct copy of the citation in the above entitled cause as the same was deposited in my office on the 10th day of June, 1907.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, this 10th day of June, 1907.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART, *Clerk.*

435 In the Supreme Court of the United States.

NORTH SHORE BOOM & DRIVING COMPANY, Plaintiff in Error,
vs.
NICOMEN BOOM COMPANY, Defendant in Error.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above entitled cause, acting by and through their respective counsel, that the printed record heretofore filed in said court in a similarly entitled action between the above named parties, wherein a writ of error was sued out to the Supreme Court of the State of

COPY

Washington, may be filed in this above entitled cause and treated as the plaintiff's record in said cause to March 18, 1906.

It is further stipulated that the above plaintiff's record shall be supplemented by an additional record of matters occur-ing subsequent to said March 18, 1906 and that such additional record shall be printed and the counsel of defendant in error furnished with the usual copies of the same on or before September 30, 1907.

And it is further expressly stipulated by and between the parties hereto that by making and entering into this stipulation, the defendant in error does not waive any rights which it may have to object to the jurisdiction of said court on any ground whatsoever; that the said defendant in error reserves the right to object to the jurisdiction of said Court in any manner it may see fit; and it is expressly understood that the defendant in error shall not be
436 held to have prejudiced itself in any manner whatsoever by reason of this stipulation.

Dated this 25th day of July A. D. 1907.

NORTH SHORE BOOM & DRIVING CO.,
Plaintiff in Error,

By W. H. ABEL,
CHAS. E. MILLER,
PILES, HOWE & FARRELL,
Its Attorneys.

NICOMEN BOOM COMPANY,
Defendant in Error,

By W. W. COTTON,
WELSH & WELSH,
JAMES G. WILSON,
Its Attorneys.

437 [Endorsed:] File No. 20,762. Supreme Court U. S. October Term, 1907. Term No. 359. North Shore Boom & Driving Co., Pl'ff in Error, *vs.* Nicomen Boom Co. Stipulation as to record. Filed Sept. 19th, 1907.

Endorsed on cover: File No. 20,762. Washington supreme court. Term No. 359. North Shore Boom and Driving Company, plaintiff in error, *vs.* Nicomen Boom Company. Filed June 17, 1907. File No. 20,762.

NO. 20,762.

In the Supreme Court of the United States

OCTOBER TERM, 1908.

North Shore Boom & Driving Company, *Plaintiff in Error,* vs **Nicomen Boom Company,** *Defendant in Error.*	No. 359.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This action is pending here on writ of error to the Supreme Court of the State of Washington, which reversed the decree of the Superior Court of the State of Washington, in and for the County of Pacific, and directed that Court to render a judgment for the plaintiff in accordance with the prayer of the complaint. A motion to dismiss the appeal was submit-

ted to this Court on January 20, 1908, and briefs were filed in support of and opposition to the motion. The Court took this motion under consideration and entered an order reserving its decision until after the case should be heard upon its merits.

This action presents a controversy between two boom companies as to the respective right to occupy a certain portion of the navigable waters of North River, in Pacific County, Washington, an arm of the sea in which the tide ebbs and flows, each claiming the right of occupancy to the exclusion of the other.

The Legislature of the State of Washington has enacted certain statutes, authorizing the construction of booms and the driving of logs, which are as follows:

Sec. 4378-B. C. Any corporation heretofore or hereafter organized in the State of Washington for the purpose of catching, booming, sorting, rafting, and holding logs, lumber or other timber products, shall have power to acquire, hold, use and transfer all such real and personal property or estate, by lease or purchase, as shall be necessary for carrying on the business of said corporation. If such corporation shall not be able to agree with persons owning land, shore rights, or other property sought to be appropriated, as to the amount of compensation to be paid therefor, the compensation therefor may be assessed and determined and the appropriation made in the manner provided by law for the appropriation of private property by railways: *Provided*, that any property acquired under the provisions of this act by the exercise of the right of eminent domain shall be used exclusively for the purposes of this act; AND WHENEVER THE USE OF SAID PROPERTY AS HEREIN CONTEMPLATED

SHALL CEASE FOR A PERIOD OF ONE YEAR, the same shall revert to the original owner, his heirs or assigns, upon the repayment of the original cost of same.

P. C. 7111; B. C. 4378. I. H. C., 1590.

Sec. 4379-B. C. Any corporation hereafter organized for the purpose mentioned in section one of this act shall, within ninety days after its articles of incorporation have been filed, proceed to file in the office of the Secretary of State a plat or survey of so much of the shore lines of the waters of the state and lands contiguous thereto as are *proposed to be appropriated* for said purpose by said corporation. Any corporation heretofore organized in the Territory of Washington for any of the purposes expressed in section one (1) of this act, shall file such plat within ninety days after the passage of this act. Such plat shall be made from the records of the United States in the Surveyor-General's office of this state, or by a competent surveyor, subsequent to actual survey.

P. C. 7112; B. C. 4379; I. H. C. 1691.

Sec. 4380-B. C. Such corporations shall have power and are hereby authorized, in any of the waters of this state or the dividing waters thereof, to construct, maintain and use all necessary sheer or receiving booms, dolphins, piers, piles or other structure necessary or convenient for carrying on the business of such corporation. *Provided*, That such boom or booms, sheer booms or receiving booms, shall be so constructed as to allow the free passage between any of such booms and the opposite shore for all boats, vessels or steam crafts of any kind whatsoever, or for ordinary purposes of navigation.

P. C. 7113; B. C. 4380; I. H. C. 1592.

The state statutes as to driving companies are found in Pierces's Code of 1905, Sections 7120 to 7127, inclusive. Section 7126 is as follows:

Sec. 7126. Should any corporation neglect for the period of eight months after improving any stream or river, to operate its dams, or to otherwise perform its duties as herein provided, then all rights herein conferred upon such corporations upon such streams or rivers, or any portion thereof, shall cease.

On March 19, 1900, the defendant in error was duly organized and incorporated as a boom company under these statutes and on April 5, 1900, it filed in the office of the Secretary of State of Washington, its plat and survey, showing so much of the shore lines and waters of North River and land contiguous thereto as it proposed to appropriate under the boom statutes of the State of Washington. (Findings of Fact 1, Record p. 310).

Before beginning the construction of its boom, the defendant in error submitted to the Secretary of War of the United States, a plan of its proposed improvements and a plat of the territory to be occupied thereby, and was granted permission by the war department to construct a boom within the limits of North River, covered by said plan of location. (Findings of Fact III, record p. 311).

Thereupon the defendant in error erected boom works along the left side of the river, going down stream, but in completing its boom, stopped far short of the upper end of the territory covered by its plat of location. Its boom completed by the driving of a succession of dolphins connected by boom sticks with a rudder sheer to catch logs, the same being

more than a mile below the upper end of its located territory, it entered into the business of booming logs. (Findings of Fact IV. and V., Record pp. 311-2).

On August 26, 1903, the plaintiff in error was incorporated under the boom statutes of the State of Washington and on the same date, filed in the office of the Secretary of State of Washington, its plat, prepared in the manner prescribed by law, showing so much of the waters and shore lines and lands contiguous as it proposed to appropriate for boom and driving purposes under its articles of incorporation and the said statutes. (Findings of Fact VI., Record p. 312).

Prior to beginning the erection of its boom the plaintiff in error procured permission from the Secretary of War of the United States, to build a boom within the limits of its said plat of location, which said permission, according to the usual practice of the war department, was evidenced by the following letter to the assignor of the plaintiff in error:

"B. O. UNITED STATES ENGINEER OFFICE.

Seattle, Washington, March 23, 1903.

Mr. John F. Hobi, South Bend, Wash.

Dear Sir: Referring to your application of February 7, 1903, for permission to construct and maintain a boom for storage of logs in North River, Pacific county, Wash., the secretary of war directs that you be informed (that the war department will interpose no objection to its construction and maintenance in the manner proposed, so long as it does not unreasonably interfere with navigation.)

"By direction and in the absence of Major Millis.

"Very respectfully,
JAMES H. MURPHY, Chief Clerk."

(Finding of Fact VII., Record p. 312).

The plat of location filed by plaintiff in error as above stated covered substantially the part of the territory embraced in the plat of defendant in error, lying above the boom works and the sheer boom as constructed by the defendant in error. Immediately after filing its plat the plaintiff in error constructed its boom within the limits of its said located territory along the right bank of North River, but 1500 feet above the rudder sheer of defendant in error, and began operating as a boom company. (Findings of Fact XII., Record p. 314).

The construction of the two booms was practically the same, excepting as to the sheer boom. The sheer boom of defendant in error was a rudder sheer, while the sheer boom of the plaintiff in error at the upper end of its works, consisted of a stationary dolphin erected above the line of the dolphins constituting the main boom and on the opposite side of the river therefrom about fifteen feet from the bank. There was a gap between this sheer boom and the upper dolphins of the main boom sufficiently wide for the passage of all water craft plying on the river. Both sheer booms were constructed to intercept logs coming down the river. (Findings of Fact X., Record pp. 313-4).

The plaintiff in error constructed its boom on the opposite side of the river from that of defendant in error and in such construction the former did not appropriate or use any part of the up-lands or tide lands belonging to the defendant in error. (Findings of Fact XII., Record p. 314).

The sheer and receiving booms of plaintiff in error were so constructed as to allow free passage between the same and the opposite shore for all boats, vessels or steam craft that ply on the river and for the ordinary purposes of navigation. North River is a meandered and navigable stream both above and below the lines of the territory covered by the plat of plaintiff in error and the tide rises and falls for a mile or more above the uppermost end thereof. The operation of the boom of plaintiff in error did not interfere with the operation of the boom of defendant in error. (Findings of Fact XIII., XIV. and XVII., Record pp. 314-5).

On September 16, 1905, the defendant in error began this action by filing its complaint in the Superior Court of Pacific County and after setting up the facts of the organization of the two boom companies, the construction of the boom of the defendant in error and that the plaintiff in error was about to construct a boom upon its said located territory, it prayed that the plaintiff in error, be restrained from constructing a boom upon the territory located by it and within the territory of defendant in error. A temporary restraining order, with a bond in the sum of five hundred dollars was granted by a court commissioner. Upon the hearing to make the temporary restraining order permanent, *pendent lite*, this bond was by order of said Superior Court, increased to the sum of three thousand dollars in default of the giving of which the temporary restraining order was to be considered vacated. The increased bond was never given by the defendant in error as directed by the court and the plaintiff in error proceeded to construct its boom according to its original plans. After the construction of the

boom of the plaintiff in error and after it had began operations and just prior to the trial of this case on its merits, to-wit, on December 1, 1903, the defendant in error filed a supplemental complaint, setting up the acts of the plaintiff in error since the commencement of said action, including the construction of its boom and operation of the same, which concludes with the following prayer:

"WHEREFORE, the plaintiff prays for judgment as prayed for in its original complaint, and in addition thereto, that the defendant be required to take up and remove all of the piling, timber and structures, and booms, which it now has in said North River, within Pacific County, Washington. (Record pp. 301-2).

The plaintiff in error entered a general denial to the complaint and supplemental complaint.

The trial of the action was begun on December 1, 1903, before the Honorable R. B. Albertson, one of the Judges of the Superior Court of the State of Washington, presiding in the Superior Court of Pacific County, and the court, after hearing the evidence and proofs, on January 15, 1904, rendered a written opinion, (See Record pp. 269-282), and directed the entry of certain findings of fact and conclusions of law, (See Record pp. 310-316), and on March 10, 1904, the Court rendered its decree that the application of defendant in error for an injunction, be denied and the action dismissed. (Record, p. 316).

The defendant in error, thereupon, appealed from the decision of Judge Albertson to the Supreme Court of the State of Washington, which latter Court, after hearing such appeal, rendered its judgment on December 6, 1905, reversing the judgment of the Superior Court, denying a petition for re-hearing

and directing that the said Superior Court proceed in accordance with the opinion previously filed. (Record p. 381). The opinion of the Supreme Court of the State of Washington is found on pages 372-380 of the record.

Thereupon, the trial court re-stated its conclusions of law and made and entered its decree, adjudging the defendant in error entitled to the possession of the entire river from its mouth and for a sufficient distance up stream to cover the located territory of both companies and excluded the plaintiff in error therefrom, without exception. On January 17, 1906, on application of plaintiff in error, Chief Justice Mount of the Washington Supreme Court allowed a writ of error to this court, directed to the judgment of the Supreme Court of the State of Washington, and ordered that said judgment should be superseded upon an approved bond in the sum of ten thousand dollars, which was duly given.

A return was made to this court, the record was printed and the final hearing was fixed for March 11, 1907. Returnable on the same day was a motion made by defendant in error asking that said writ be dismissed on the ground, among others, that the said judgment of the Washington Supreme Court to which it was directed, was not a final judgment and the plaintiff in error procured the dismissal of its said first writ of error.

On March 13, 1907, two days later, the plaintiff in error made application to Chief Justice Hadley of the Washington Supreme Court, for its second writ of error, but directed to the judgment of the trial court, made and entered on January 16, 1906, in obedience to the mandate of said Supreme Court. The record being in the State Supreme Court, the

return to this writ of error was made by that court. Chief Justice Hadley also granted an order of supersedeas, conditioned upon an approved bond of $20,000, which was duly given.

On July 25, 1907, the parties to this action by their respective attorneys, entered into a written stipulation, duly filed in this court, to the effect that, so far as applicable, the printed record filed under the first writ of error, should have added the proceedings subsequent thereto, and the same should constitute the printed record upon the second writ of error. The printed record was duly filed in this court in accordance with this stipulation.

ASSIGNMENT OF ERROR.

The plaintiff in error respectfully submits that in the record, proceedings, decisions and final judgment of the Supreme Court of the State of Washington in the above entitled matter, there is manifest errer in this, towit:

1. For that the court erred in not finding and deciding that plaintiff in error had a good and valid permission from the Secretary of War to construct its said boom.

2. For that the court erred in finding and deciding that the defendant in error had a good and valid permission from the Secretary of War to hold the territory occupied by the boom of plaintiff in error for its contingent future necessities.

3. For that the court erred in not finding and deciding that the permit and license granted by the

Secretary of War to plaintiff in error to construct its said boom operated as, and was a, revocation of the permit and license previously granted by the Secretary of War to construct its said boom.

4. For that the court erred in finding and deciding that at the time of the commencement of this action the defendant in error was entitled to the possession of, and to hold, the entire area covered by its plat as filed in the office of the Secretary of the State of Washington.

5. For that the court erred in finding and deciding that the defendant in error had a right prior to that of the plaintiff in error, to the area covered by the said boom of plaintiff in error.

6. For that the court erred in not finding and deciding that the defendant in error appropriated only so much of the area included within its said plat as filed in the office of the Secretary of the State of Washington, as was, at the time of the filing of the said plat of the plaintiff in error in the office of the Secretary of the State of Washington, actually used and occupied by it, the defendant in error, for boom purposes.

7. For that the court erred in not finding and deciding that the defendant in error appropriated so much, only of the area of the waters of the said North River as was in actual use by it for boom and rafting purposes at the time it completed its said boom.

8. For that the court erred in reversing the finding and judgment of the Superior Court of the State of Washington, in and for the County of Pacific.

9. For that the court erred in giving and enter-

ing its said judgment in favor of the defendant in error.

10. For that the court erred in giving and entering judgment impairing and violating the rights of the plaintiff in error, under the Fourteenth Amendment of the Constitution of the United States.

ARGUMENT.

JURISDICTION OF THIS COURT.

By the Seventh Section of the River and Harbor Act, passed by Congress and approved September 19, 1890, Chapter 907, 26 Stat. at L. 426, 454, it was provided as follows:

"That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the con-

struction of any bridge, bridge-draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any state, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable waters of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge-draw, bridge piers, and abutments the construction of which has been heretofore duly authorized by law, or to be so construed as to authorize the construction of any bridge, drawbridge, bridge piers and abutments, or other works, under an act of the legislature of any state, over or in any stream, port, roadstead, haven, or harbor, or other navigable water not wholly within the limits of such state."

Section ten of the Act of Congress of March 3, 1899, C. 425, Sec. X., 30 Stat. at L. 1151, is as follows:

"That the creation of any obstruction, not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States, is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, bulkhead, breakwater, jetty, or other structure in any port, roadstead, haven, harbor, channel, navigable river or other water of the United States, outside established harbor lines, or where no harbor lines have been established, excepting on plans recommended by the Chief of Engineers

and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, channel, lake, harbor of refuge, or enclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to the beginning of the same."

Both boom companies were incorporated after the passage of these several Acts of Congress and both recognized the authority of Congress by securing permission from the Secretary of War to erect their respective boom structures.

Prior to the Act of Congress, already referred to, the earlier cases had, undoubtedly laid down the doctrine that, in the absence of legislation by Congress, a state might authorize a navigable stream, within its limits, to be obstructed by a bridge, dam, boom, or other structure calculated to assist commerce.

Wilson vs. Blackbird C. M. Co., 2 Pet. 245.
Pound vs. Turck, 951 Um. S. 459.
Gilman vs. Philadelphia, 3 Wall. 713.
Cardwell vs. Am. R. B. Co., 113 U. S. 205.

The decision of these cases and those similar, of which there are many, all considered that the paramount authority over the navigable streams of the United States was vested in Congress, but in all cases where Congress had failed to act and had not undertaken to exercise its authority, the state might, in the meantime, exercise this control, the theory being, as announced in a number of the cases, that the

state would do less harm than good. The Acts of Congress of 1890 and 1899, however, were a declaration, that the paramount authority was vested in Congress and that thereafter the Federal Government would exercise, exclusive domain over all navigable waters and ever since that time the Secretary of War has maintained strict surveillance over these waters. Hence, the right of any person or corporation to occupy the navigable waters of the United States, such as in question here, is wholly a Federal question.

The statute of 1890 was construed by this court in the case of United States vs. Bellingham Boom Company, 176 U. S. 218, and upon the subject of the nature of the question involved in that case we cannot do better than to quote the opinion of the court, delivered by Mr. Justice Peckham:

"If there were no Federal law in existence, then the question whether the boom was authorized by a state law, or complied with its provisions, would be a state question, as is clearly set forth in the above extract. But the Federal law has been passed. The question then is whether the structure is permitted by these laws, and when that law says it may continue, if affirmative authorized by a state law, the question whether it is so authorized becomes in effect a question whether the Federal law does or does not permit it. IF IT IS AUTHORIZED BY THE STATE LAW, THEN THE FEDERAL LAW PROVIDES THAT IT MAY CONTINUE, AND WHETHER IT IS OR IS NOT, BECOMES A QUESTION FOR THE FEDERAL COURT TO DECIDE."

At the time of the passage of the Act of 1890, the boom in controversy in the Bellingham case had

been already constructed and the authority of the United States was resisted in that case because it was claimed that the boom had been constructed by state authority and had therefore been duly authorized. In the case at bar, both Acts of Congress, to-wit, those of 1890 and 1899, had been enacted and were in full force at the time plaintiff in error and defendant in error were incorporated, constructed their booms and engaged in the business of booming logs.

Clearly, under these Federal statutes there could be no lawful occupancy of the navigable waters of the United States without permission from the Secretary of War, and hence, any dispute between opposing parties as to such right of occupancy is necessarily a Federal question.

The case of Cummings vs. Chicago, 188 U. S. 410, involved the right to construct a dock in a navigable river by riparian owners having the Federal assent, but in opposition to a police regulation by the State of Illinois. The plaintiffs, citizens of Illinois, filed their bill to enjoin the City of Chicago from interfering with the construction of the dock in Calumet River. The defendant demurred to the bill upon the grounds that it did not state facts entitling the plaintiffs to the relief asked and that no Federal question was involved. In denying this contention, Mr. Justice Harlan, in his opinion, used the following terse language:

"We hold that the circuit court had jurisdiction in this case. That the parties, plaintiffs and defendants, are citizens of the same state, is not sufficient to defeat the jurisdiction; for by the act of March 3rd, 1887, Chapter 373, as corrected by the act of August 13, 1888, Chapter 866, the circuit courts have jurisdiction, without reference to the citizenship of the parties, of all suits at common law or in

equity arising under the constitution or law of the United States.

24 Stat. at L. 552, 25 Stat. at L. 433. (U. S. Comp. Stat., 1901, p. 508).

The present suit does arise under the constitution and laws of the United States, because the plaintiffs based their right to construct the dock in question upon the Constitution of the United States, as well as upon certain Acts of Congress and the permit (so called) of the Secretary of War, which legislative enactment and action of the Secretary of War were, it is alleged, in execution of the power of Congress, under the Constitution, over the navigable waters of the United States. Clearly such a suit is one arising under the Constitution and Laws of the United States. That it is a suit of that character appears from the bill itself. The allegations which set forth a Federal right were necessary in order to set forth the plaintiffs' cause of action."

It was necessary for the defendant in error to allege in its complaint that before constructing its boom, it had acquired the permission of the Secretary of War to that end. The consent of the Secretary of War must continue to make such occupancy valid. These matters were the foundation of the right of the defendant in error to construct and operate its boom. They are rights given by the Federal statute and undeniably the legal effect presents a Federal question and none other.

The findings of fact, made and entered by the trial court, found on page 310 of the printed record, constitutes the pleadings and case upon which a trial *de novo* was had before the Supreme Court of Washington according to the practice in that state:

Codwell vs. First Natl. Bk., 3 Wash. 196.
Stanger vs. Roeder, 3 Wash. 419.
Boyer vs. Boyer, 4 Wash. 81.
Kirby vs. Collins, 6 Wash. 297.
Kane vs. Kane, 35 Wash. 573.
Caughey vs. Rien, 37 Wash. 298.
Nicomen Boom Co. vs. N. S. Boom & D. Co., 40 Wash. 315.

Paragraph III. of the findings of fact, page 311 of the printed record, recites that before beginning the construction of its boom the defendant in error was granted permission by the war department to construct the same; and paragraph VII., printed record, page 312, recites that plaintiff in error had a similar permission. Both parties showed cognizance of the Federal statute and thus recognized and acknowledged the necessity of a license from the Federal authority, thereby conceding that the abstract right to occupy the navigable waters of the United States was based upon Federal assent. In its opinion, printed record, page 372, line 16, the Supreme Court of Washington, referring to defendant in error, makes the following statement:

"* * * * * Before beginning the construction of its boom, it submitted to the Secretary of War of the United States, a plan of its proposed improvements and a plat of the territory to be occupied thereby and was by said war department, granted permission to construct a boom within the limits of said river, covered by said plat of location. The territory designated by said plat of location, embraces the shores of North River, which river is tributary to Willapa Harbor, a bay leading into the Pacific Ocean, and the territory extends from near the mouth

of the river on both sides for some distance up the stream."

Upon the same subject and referring to the plaintiff in error the court uses this language at page 373 of the printed record, line 11:

"It also claims that before commencing to construct its boom it secured from the war department of the United States, permission to construct within its location. The plat of location filed by the defendant in the office of the Secretary of State, covered substantially the part of the territory embraced in the plat of the plaintiff, lying above the upper end of the sheer boom constructed by plaintiff, aforesaid."

And it further appears from the opinion, (page 379, line 14, of the printed record,) that the court declined to consider whether plaintiff in error had permission from the Secretary of War to construct its boom, or not.

It thus clearly appears that the parties invoked the Federal authority and that the court below, necessarily, considered the Federal statute in rendering its decision.

Further, this court has held that the erection of a structure in a navigable river within the limits of a state depends upon the concurrent or joint assent of both the National Government, and the State Government where the question of the enforcement of a police regulation of the latter is involved. The Secretary of War under the authority conferred by Congress, may assent to the erection of such a structure by private parties. Without this assent the structure cannot be erected.

Cummings vs. Chicago, 188 U. S. 410.

Montgomery vs. Portland, 190 U. S. 89.

As the authority over the navigable waters of the United States is paramount in Congress and any voice in their control by the state is only by sufferance and by the grace of Congress, now withdrawn by the acts of 1890 and 1899, already referred to, as to what constitutes the assent of a state, to be concurrent with National assent, is *ipso facto* a Federal question. There is no logic in the position that the assent of the state, in such a case, is purely a local matter to be decided by the state courts and that in any such controversy the United States Courts can decide only whether there has been the necessary Federal assent.

The third assignment of error is, in effect, that when the Secretary of War gave the plaintiff in error permission to construct its boom, such act was a revocation of so much of the permit or license granted to the defendant in error three years before, as was covered by or included in the permit or license granted to the plaintiff in error, aforesaid.

The authority of the Secretary of War under the Acts of Congress of 1890 and 1899, the effect of his assent to the erection of structures in navigable waters and the estate granted thereby, whether revocable, and if revocable whether revocable by implication, and whether such assent carries with it vested rights are, from their very nature, all Federal questions and can only be decided by any court by construing the said Federal statutes.

It was the contention of the plaintiff in error that the Nicomen Boom Company had appropriated only so much of its located territory as it had reduced to actual possession and used for boom pur-

poses, and that having allowed the remaining territory to lie idle, unused and unappropriated, it had abandoned the same, and hence, whatever its original rights, it did not have the state assent, that is, the state assent had not continued, at the time the plaintiff in error made its location.

But, the exception in the Act of Congress of 1899 is a structure authorized by a state law. In any case in which the Secretary of War might be called upon to exercise his authority under this statute, he must assertain *first*, whether the state has taken jurisdiction, and, *second*, whether the conditions prescribed by the state had been complied with and amounted to an assent. If the Secretary of War must decide these matters before he can act and to cover his action, they must be solely Federal questions. In this case, if the Secretary of War granted a license to the plaintiff in error to construct its boom within territory not actually appropriated by the defendant in error, unused by it and not in its possession, he must have decided that the defendant in error did not have the state assent at that time, whatever may have been the case three years before. If the territory occupied by the boom of plaintiff in error was unappropriated at the time it made its location, then it had the state assent, as the state boom law, is self-executing. The Washington Supreme Court held that the filing of a boom plat was analogous to the filing of a plat for right of way by a railroad corporation which would hold the location until actual abandonment and that therefore the defendant in error had the state assent and that plaintiff in error could not have such assent. This was the sole question in the case, as decided by the Supreme Court of the State of Washington, and

from its very nature could only be a Federal question.

Blythe vs. Hinckley, 180 U. S. 333.
American Sugar Co. vs. Louisiana, 179, U. S. 89.
Douglass vs. Wallace, 161 U. S. 346.

While the Act of Congress of March 3, 1899, section X., places the control of the navigable waters of the United States wholly in the hands of the Secretary of War, it will be noted that the exception as to structures, previously authorized by a state, is entirely omitted from the later act. This shows conclusively that so far as the abstract right to navigate the waters of the United States is concerned, it was regarded by Congress, and so declared to be, solely within its jurisdiction. Both of these booms were constructed subsequent to March 3, 1899, and the rights of either company could emanate only from Federal authority and the question thus becomes, wholly, a Federal question. As we have seen, the navigable waters of the United States are solely under the control of Congress and are not at the disposal of a contiguous state. The state may exercise any reasonable police power, and its courts may exercise jurisdiction over maritime controversies, *in personam*, but beyond this the authority of the state cannot go.

The decree of the Supreme Court of the State of Washington awards to the defendant in error, not the located territory provided by the state boom statute leaving an unobstructed passage-way for commerce, BUT THE ENTIRE RIVER FROM ITS MOUTH TO THE HEAD OF TIDE WATER, and excluded the plaintiff in error therefrom, without exception, notwithstanding the fact that it is, also, a

driving company and in spite of the inhibition of the state constitution against the granting of exclusive rights and the conferring of monopolies.

The decree vests the defendant in error with a monopoly upon one of the most important highways on the Pacific Coast and is in violation of the 14th Amendment to the Constitution of the United States.

That the decree violated this amendment to the Constitution of the United States in this respect was specially urged in the petition for re-hearing and was denied by the court and thus a second Federal Question was presented.

Minn. & St. L. R. Co. vs. Minn. 193 U. S. 53.

JURISDICTION—HOW APPARENT.

In Armstrong vs. Athens County, 16, Pet. 281, this court states the principles by which its jurisdiction is governed in six paragraphs, the last of which reads as follows:

"*Sixth.* It must appear from the record that the question was necessarily involved in the decision; that the state court could not have given the judgment or decree which they have passed, without deciding it."

This is the leading case upon the subject of jurisdiction and it is cited in many subsequent cases, notably in the following:

Moore vs. Mississippi, 21 Wall. 638.
Murray vs. Charleston, 96, U. S. 442.
Crossley vs. New Orleans, 108, U. S. 105.
Weatherby vs. Bowie, 131, U. S. CCXV.
Kaukauna vs. Green, B. C., 142, U. S. 69.
Gulf etc. R. R. vs. Howes, 183, U. S. 269.

In Murray vs. Charleston, 961, U. S. 442, the rule is still more forcibly stated as follows:

"The true test of the jurisdiction of this court over state judgment is not whether the record exhibits an express statement that a Federal question was presented, but whether such a question was decided and decided adversely to the Federal right."

Anderson vs. Carkins, 135 U. S. 483.

If it appears from the record by clear and necessary intendment that the Federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient to give jurisdiction.

Powell vs. Brunnswick Co., 150 U. S. 433.

It is not necessary that the treaty or Act of Congress on which the Federal right is based, should have been pleaded specially or spread upon the record. It is sufficient if the record shows that it must have been construed.

McCullough vs. Virginia, 172, U. S. 118.

Where a decision by the state court of the Federal question appears to have been the foundation of the judgment, a writ of error lies.

Wedding vs. Weyler, 192, U. S. 573.

Other cases in point, deciding the general principle here contended for, are the following:

Covington vs. Sanford, 164 U. S. 573.
Mitchell vs. Clark, 110 U. S. 645.
Boyd vs. Nebraska, 143 U. S. 180.
Des Moines vs. Iowa H. Co., 123 U. S. 555.
Erie R. Co. vs. Purdy, 185 U. S. 148.
Snell vs. Chicago, 152 U. S. 191.
Muter vs Montgomery, 156 U. S. 385.

Walter A. Wood Co. vs. Skinner, 139 U. S. 295.

Cook Co. vs. Calument Dock Co., 138 U. S. 365.

C. B. & Q. R. vs. Chicago, 166 U. S. 228.

The final objection to the jurisdiction of this court made by the defendant in error is based on an allegation that no citation had been served upon the defendant in error.

There is no basis for this contention as an inspection of the printed record, pp. 410-2, will show, and the objection is untenable for the following reasons:

1. On March 26, 1907, the Sheriff of Pacific County personally served the defendant in error with a notice signed and issued by the Chief Justice of the Supreme Court of Washington which, omitting the venue and title was as follows:

"A petition for a writ of error having been granted to the Supreme Court of the Unted States, the said writ of error being returnable on the twelfth day of May, A. D. 1907, from a judgment rendered in the Superior Court of the State of Washington, in and for the County of Pacific on the Sixteenth day of January, A. D. 1906, in obedience to the mandate of the said Supreme Court of the State of Washington, issued on the sixth day of December, A. D. 1905, in favor of the appellant, Nicomen Boom Company, and against the respondent, North Shore Boom and Driving Company, reversing the former judgment and decree of the said Superior Court of the State of Washington, in and for the said County of Pacific, and directing a judgment and decree in favor of the appellant Nicomen Boom Company in accordance

with the prayer of its complaint and the said respondent, North Shore Boom and Driving Company, having executed and filed its supersedeas bond in the sum of twenty thousand dollars and the same having been by me approved,

Therefore, the appellant, Nicomen Boom Company and all others are commanded to stay proceedings on said judgment and decree.

Witness my hand this 20th day of March, A. D. 1907.

(Seal of the Supreme Court, State of Washington)

Hiram E. Hadley,
Chief Justice of the Supreme Court of the
State of Washington."

Every material fact of which the defendant in error would be apprised by the service upon it of a common law form of citation, is set forth in the above notice, no matter by what name it may be called. And the notice was emphasized by the command to stay all proceedings contained therein.

In Dodge vs. Knowles, 114, U. S. 430, the citation wasnot served but the appelle was served with an order directing him to appear and argue the case and this court held a citation unnecessary.

2. The object of a citation is notice and where sufficient notice has been given by a stipulation and motion it is unnecessary.

United States vs. Gomez, 1 Wall. 690.
Goodwin vs. Fox, 120 U. S. 775.

As long ago as July 25, 1907, the parties to this writ, by their several attorneys, entered into a stipulation in writing, filed in this court, providing for the printing of the record. (Printed record pp. 411-2).

The plaintiff in error has furnished a printed record in this case at an expense of over $1500. In entering into the stipulation the defendant in error reserved the right to object to the jurisdiction of this Court and it had in mind, apparently, at that time, the making of this motion. This stipulation saved to it the trouble and expense of printing a record upon which to base its motion.

3. A citation was actually issued, although it does not appear to be accompanied by proof of service. (Printed record, p. 411).

This Court has repeatedly held that if a citation was actually issued but not served before the first day of the term to which it was returnable, leave might be granted to make the service during the term.

Dayton vs. Lash, 94 U. S. 112.
Richards vs. Mackall, 113 U. S. 539.
Peugh vs. Davis, 110 U. S. 227.

The contention that this court is without jurisdiction is not sustained by the authorities and the plaintiff in error is clearly entitled to have the merits of this case considered and decided.

ARGUMENT ON THE MERITS.

PROPOSITION I.

Since the Passage of the Acts of Congress of 1890 and 1899, Authority Over the Navigable Waters of the United States Has Been Wholly in the Hands of the Federal Government and Control by the Several States in the Premises Has Been Limited to the Exercising of the Police Power.

Paramount control and authority over the navigable waters of the United States was always vested in Congress, but the legislation necessary to the active control, to the exclusive jurisdiction, had not been enacted, and the Federal control lay dormant. Congress having failed to act, the several states, in various instances, and sometimes under delegated power assumed jurisdiction. These acts of control by the states were never regarded as more than concurrent, outside of the exercise of the police power and were regarded by the courts as simply permissive, and usually affirmed upon the ground, as many of the cases put it, that the state would do less harm than good, and until Congress assumed active jurisdiction no limitation was to be put upon any of the reasonable acts of the state by the courts. Tersely put, the authority of the states over such navigable waters was by sufferance. When Congress passed the act of 1890, which was supplemented by the act of 1899, it assumed sole jurisdiction

over these navigable waters and the states are now excluded from any participation in the control of the navigable waters, whether lying wholly within one state or otherwise, and the state is limited to the exercise of its police power. Hence, whatever rights the defendant in error has to the exclusion of its adversary, so far as the state of Washington is concerned, they must be deraigned through the police power of the state.

While an accurate definition of the police power seems impossible, broadly speaking, it means the general power of a government to preserve and promote the public welfare by prohibiting all things hurtful to the comfort, safety and welfare of society, and establishing such rules and regulations for the conduct of all persons and the use and management of all property as may be conducive to the public interest.

Munn vs. Illinois, 94 U. S. 69.
L. S. & M. S. R. Co. vs. Smith, 173 U. S. 684.

The police power is inherent in the several states and is left with them under the Federal system of government, and may always be exercised by the state legislatûres.

Munn vs. Illinois, 94, U. S. 69.
Ex parte Yarborough 110 U. S. 651.
In re Rahrer, 140 U. S. 545.

A boom company is a company formed for the purpose of improving streams for the floating of logs, by means of booms and other contrivances, and for the purpose of running, driving, booming, sorting and rafting, logs, timber and lumber.

Watts vs Tittabawassee Boom Co., 52 Mich. 206.

Anderson vs. Thunder Bay River Boom Co., 61 Mich. 489.

A boom is an enclosure formed upon the surface of a stream or other body of water, by means of spars, for the purpose of collecting or storing logs or timber.

Clark vs. C. N. N. Lumber Co., 34 Minn. 289.

Boom companies are intended to supply facilities for the driving of logs to the general public and are organized for the purpose of conducting on a large scale, and under one management the business of driving and rafting logs for all who apply.

Osborne vs. Knife Falls B. C., 32 Minn. 412.
West B. B. Co. vs. Pa. J. L. Co., 121 Pa. St. 158.
Duluth L. Co. vs. St. L. Boom Co., 17 Fed. 419.
Cohn vs Wausau Boom Co., 47 Wis. 314.

Boom companies being quasi public corporations the legislature may require them to charge reasonable tolls, to keep certain records for public inspection, make them liable for the loss of timber productions in certain cases, give them the right of eminent domain as to shore lands, and prescribe such regulations, in the interest of the public, as the nature of the business may require. It may empower boom companies to improve streams and to overflow lands upon giving compensation.

Lawler vs Baring B. Co., 56 Me. 445.
Benjamin vs Manistee R. I. Co., 42 Mich. 628.
Wis. R. I. Co. vs Manson, 43 Wis. 255.
Duluth L. Co. vs St. L. B. Co., 17 Fed. 419.
Grand Rapids B. Co. vs Jarvis, 30 Mich., 308.

The states have been held to possess the power to grant the exclusive right to maintain booms or driving logs in any stream, but this was only because of absence of Congressional action.

Osborne vs Knife Falls B. C., 32 Minn. 412.
Cohn vs Wausau B. Co., 47 Wis. 314.
Duluth L. Co. vs St. L. B. Co., 17 Fed. 419.
South Bay B. Co. vs Jewett, 10 N. B. 267.

The booming of logs is a species of navigation and the rights of boom companies to the reasonable use of navigable streams for the purpose of running, driving, booming and rafting of logs, is the same as that of vessels, so long as they do not needlessly obstruct the stream or injure its navigable capacity.

Erie vs Canfield, 27 Mich. 479.
Hayward vs Knapp, 23 Minn. 433.
People vs Horton, 64 N. Y. 610.
U. S. vs Marthinson, 58 Fed. 765.
U. S. vs Burns, 54 Fed. 351.
Cohn vs Wausau Boom Co., 47 Wis. 314.
J. S. Keater L. Co. vs St. Croix B. C., 72 Wis. 62.

A properly constructed boom is not necessarily a public nuisance because it interferes with the operations of another boom on the same stream.

Atty. Gen. vs Everett B.Co., 34 Mich. 462.
Leigh vs Holt, 5 Biss. 338.

But,the police power is simply for the purpose of regulation under proper circumstances and does not extend to authorize the state to regulate on matters which are, under the Federal system of

government, within the exclusive jurisdiction of the Federal Congress.

Hendrickson vs New York, 92 U. S., 259.
N. O. Gas Co. vs Louisiana L. Co., 115 U. S. 650.
Morgan S. Co. vs La. B. of H., 118 U. S. 462.
W. U. Tel. Co. vs New York, 38 Fed. 552.

The agencies of the Federal government are exempt from state control by police regulation, so far as that regulation may interfere with or impair their efficiency in performing the functions by which they are designed to serve the government.

W. U. Tel. Co. vs New York, 38 Fed. 552.

In the casea t bar there is no pretense that the plaintiff in error has violated any of the police regulations of the state of Washington, and the state is not here seeking to enforce any such regulation. In legal effect this is simply an action between two private corporations to try the title to certain territory comprised within the banks of a navigable river which ebbs and flows with the tide. As we have seen, as to who shall use a navigable stream for the purpose of navigation, under the acts of Congress of 1890 and 1899, is vested solely in the Secretary of War and the authority of that official is the only question in this case. The right of the Secretary of War to say that the plaintiff in error may occupy a portion of North River with its boom is supreme and absolute and the state has no concern with the matter except to regulate the business of the plaintiff in error in case it engages therein after procuring the assent of the Federal government. The state may make any reasonable

regulation as to the conduct of that business if the plaintiff in error proceeds to engage therein. Probably, it may prescribe the size of piling, spars and boom sticks, that they shall be of hemlock or fir, what reasonable tolls may be charged, what records shall be kept, that the products of non-contracting owners shall be passed through the boom without delay, and otherwise reasonably regulate the business, but beyond this the state cannot go. Any attempt of the state, since 1890, to say who shall and who shall not navigate North River, is entirely without jurisdiction, void and an assumption of authority which the state does not possess. This is the controversy in a nutshell.

PROPOSITION II.

The Granting of the License by the Secretary of War to the Plaintiff in Error to Construct its Boom in North River Was a Revocation of So Much of the License Granted to the Defendant in Error as Related to the Territory Located by the Former.

The Secretary of War granted permision to the defendant in error to construct its boom in North River, co-extensive with its original plat. Only a portion of this territory was actually appropriated with boom works under this permit. More than three years later, a large portion of this territory being vacant and unoccupied, the Secretary of War granted a similar permit to the plaintiff in er-

ror to ocupy a portion of such unoccupied and unappropriated territory with its boom.

Conceding that the state had been delegated authority by Congress to exercise its authority over all navigable public rivers, the right to occupy and use the same is dependent upon the concurrent consent of the state and the United States and the control of the general government being in the interest of unobstructed navigation, the consent of the latter must remain revocable, as circumstances may require, and is in the nature of a license.

Cummings vs Chicago, 188 U. S. 410.
Montgomery vs Portland, 190 U. S. 89.

In the case at bar only a portion of its located territory had been reduced to possession by the defendant in error by actual appropriation. It had constructed its boom, was carrying on its business and gave no indication, until a rival appeared, that it did not have all the territory it intended to take. When the plaintiff in error presented its application for permission to erect its boom, it must be presumed that the Secretary of War had fully investigated the situation, knew all of the facts and that when he granted the second permit, every natural consequence of such act was intended. Both parties could not occupy the same territory with a boom at the same time. The one necessarily excluded the other and the later locator upon receiving the grant promptly took possession by constructing its boom before any attempted user by the other. The defendant in error could have terminated its right in North River by going out of business, the Secretary of War might revoke permission at any time, and the mere granting of a permit could not

be the foundation for vested rights. The right was simply a personal privilege, terminable at the will of either party, a mere license.

But a license may be revoked at any time by the licensor, by the doing of an act evidencing an intention to revoke it.

Nichols vs Peck, 70 Conn. 439.
Wilson vs St. Paul R. R. Co., 41 Minn. 56.
Johnson vs Skillman, 29 Minn. 95.
Hazleton vs Putnam, 3 Pin. 107.
Dunham vs Joice, 129 Mo. 5.
Fischer vs Johnson, 106 Iowa 181.

A license founded on a valuable consideration to take water from a spring is revoked by a deed from the owner granting to another the right to draw an amount of water that will exhaust the supply.

Ekerson vs Krippen, 110 N. Y. 585.

The Secretary of War may have concluded that the defendant in error had abandoned the unused territory by neglecting to avail itself of the prior license, or, that to refuse to grant the second license would create a monopoly in the busines of booming logs on North River or that two boom companies in oposition to each other would create a healthy competition and be more apt to keep the river open in thus, impliedly at least, revoking the first license. If its license, as to the territory in dispute, had been revoked, then the defendant in eror would not have the consent of the Federal government to occupy the disputed teritory at the time this action was brought. In the absence of such consent, its title failed and it cannot maintain ejectment or what is its equivalent, the writ of mandatory injunction. It must recover upon the strength of its own title

and not upon the weaknes of the title of its adversary.

In the ordinary action by injunction to restrain trespass, waste or kindred injuries to real property the plaintiff must allege and prove title in himself or he cannot have a decree. A mere equitable interest will not support the action.

Youn vs Porter, 3 Woods C. C. 342.
Fussell vs Hughes, 113 U. S. 565.

The defendant in error as against the plaintiff in error, had no right to the possession of the disputed territory unless it was authorized to use the same for some of the purposes mentioned in the act of Congress. The permission of the Secretary of War under which there had never been an appropriation or user, having ben revoked, it had no standing in court.

PROPOSITION III.

The Permit Granted to the Defendant in Error to Erect a Boom Structure in the Navigable Waters of North River Was Limited to its Acceptance Under the Same.

The permit granted to the defendant in error by the Secretary of War was limited to the erection of a certain structure in the navigable waters of North River, according to a defined plan submitted with the application. Under this authority it constructed and completed a boom and engaged in the business of catching, booming, sorting and rafting logs.

But, in the erection of its boom structure, it made no use of the upper one mile or thereabouts, of its located territory, leaving the same vacant.

While the defendant in error was authorized to occupy its entire located territory, it acepted the privilege granted by the Secretary of War only to the extent to which it made actual appropriation of such territory by the erection of its boom structure. The permission went to the structure itself. The defendant in error acted thereon, made its selection and was bound by its acceptance of only a portion of the located territory. To complete a grant of, even an incorporeal hereditament, there must be an acceptance. Ordinarily, the law will presume an acceptance of the entire grant, but where the conduct of the parties clearly shows the contrary in whole or in part, this presumption will not obtain. Besides, by the erection of its boom structure, completing the same and engaging in its business, its authority over its license was exhausted, as appears by analogy from the following cases:

A power to make a goit or sluice and keep it in repair is exhausted by making one goit or sluice.

Bostock vs Sidebottom, 18 Q. B. 813.

Where a license to put in "water mains" is given but only one main is completed, only that one can be laid.

Great Falls W. W. Co. vs G. N. R., 21 Mont. 487.

A license to erect a structure does not carry with it the right to rebuild as, on the erection of the building, the act has been done and the license is at an end.

Clark vs Glidden, 60 Vt. 702.

A license to build a dam does not carry a license to rebuild it if destroyed.

Washburne on Real Property, 299.
Cowles vs Kidder, 24 N. H. 364.
Carleton vs Ridington, 21 N. H. 293.
Wingard vs Tift, 24 Ga. 179.

A parol license to build a bridge does not confer a right to rebuild.

Hall vs Boyd, 14 Ga. 1.

Where, under a license to build a road across a bay, a road had been constructed on piles, the license is exhausted, and an embankment cannot be substituted thereafter for the piles, even though it might have been made in the first instance.

Southampton vs Jessup, 10 N. Y. App. Div. 456.

PROPOSITION IV.

The Plaintiff in Error, With the Assent of the Secretary of War, Occupied Only a Portion of the River Reserved for Purposes of Navigation Under the Location of Defendant in Error and Only the Federal Government Could Complain.

The defendant in error, in compliance with the state boom statutes, located its boom along the left bank of the river, acquiring the shore and tide lands and leaving the channel for navigation along the right bank. The plaintiff in error acquired the title to the shore and tide lands on the right bank of the river and with the per-

mission of the Secretary of War, located and constructed its boom along that bank, more than 1300 feet above the boom of the defendant in error and in that portion of the river reserved under the latter's location for the purposes of channel and navigation. While the complaint charges the plaintiff in error with having entered upon the tide and shore lands of the defendant in error, the court below found the facts to be as above stated. (Findings 2 and 8, record, pp. 310 and 313.

There is no allegation in the pleadings that the plaintiff in error was maintaining a nuisance or violating any of the police regulations of the state. The contest was confined to the abstract question of priority of right to that portion of North River occupied by the boom structure of the plaintiff in error. The Federal laws require that all navigable rivers shall be kept free from obstructions to navigation. The laws of the state of Washington recognize navigable streams as public highways and their policy is to preserve them as such. In creating boom companies it is well understood that no exclusive use of the highway is granted and that the ordinary navigability of streams is not to be interfered with.

The defendant in error had by choice located its territory along the left bank of the river with which to occupy its boom. It lay no claim to the right bank because it was necessary under the state boom statutes that, that side of the river should be reserved for purposes of navigation. How the right bank, or channel portion, of the river was occupied or used did not concern the defendant in error. It was only incumbent upon itself to avoid all personal culpability in obstructing navigation. The of-

fense of some other person in the premises was none of its affair. The United States and the state were the guardians of navigation and if the plaintiff in error went upon the channel of North River and obstructed it, it was no more concerned than any other member of the public and it has no standing in this action. Aside from obstructing general navigation the two booms could be operated side by side and nothing in the pleadings shows any special damages. Nothing in the conduct of the plaintiff in error prevented the defendant in error from extending its boom if it had that right, as the plaintiff in error did not construct its boom outside of the territory located by it. Only the two governments could complain of this. And nothing could better illustrate how erroneous was the view of the Supreme Court of Washington than an inspection of the judgment of January 16, 1906, made by the Superior Court, under the former's direction, which shows that instead of awarding the defendant in error the territory located by it and reserving a channel, the possession of the entire river from shore to shore is awarded to it.

PROPOSITION V.

The Legal Effect of Filing a Plat Under the Boom Statutes of Washington Does Not, in Itself, Confer Any Exclusive Right to Occupy Navigable Waters but Amounts Simply to Notice of an Intended Appropriation.

It was contended by thedefendant in error in the court below, that by the mere filing of its plat under

Secs. 4379 and 4389 of Ballinger's Code, it acquired the exclusive right to occupy the entire area within its plat limits for boom purposes, and that this exclusive right would be forfeited only by failure to occupy and use the premises for the period of ten years and that, in any event, only the state could complain of the non-user. This contention was, practically, adopted by the Supreme Court of Washington in rendering its decision.

The boom statutes do not limit the area which may be included within the plat; and if the first boom company platting navigable water area, thereby acquires not only the first right but the exclusive right, the result is a monopoly.

It is fair to presume that the legislature in enacting the several boom statutes, intended thereby to encourage the improvement of rivers and navigable waters for the purpose of advancing the logging industry. To prevent competition in booming would have a stifling effect upon that industry and might even be prohibitive in its effect. Hence, the presumption arises that the legislature intended that a boom company should only appropriate what would be reasonable and sufficient to carry on its business.

Again, Sec. 4388 confers the right to acquire property by the exercising of the right of eminent domain, limiting the same to what "shall be necessary for carrying on the business of a corporation." Only property reasonably necessary for corporate purposes could be condemned under this statute from which it is apparent that the legislature intended to make it certain that a boom company could not condemn property and then fail to use it.

S. R. Boom Co. vs Union Boom Co. 32 Wash. 586.

Sec. 4378 provides as follows:

"That any property acquired under the provisions of this chapter by the exercising of the right of eminent domain shall be used exclusively for the purpose of this chapter and whenever the use of said property as therein contemplated, shall cease, for a period of one year, the same shall revert to the original owner his heirs or assigns, upon the repayment of the original cost of the same."

The supplemental boom act of 1895 contained a similar limitation but omitted the repayment of the costs of condemnation in order to secure the reversion.

Sec. 4388 Ballinger's Code.

It thus appears that in two separate acts, each in force, the legislature has provided that property condemned for boom purposes by the exercise of the right of eminent domain, if not used for one year for boom purposes, shall revert to the original owner. The purpose of these statutes is evidently that non-user for one year shall work a forfeiture of boom rights. If condemned property thus reverts for mere non-user, the reason would be much stronger that property not condemned and in respect of which merely a plat had been filed, should be held to work a waiver in favor of the public.

The policy of these statutes then is that the boom company is limited to the appropriation of territory to its necessities.

Secs. 4379 and 4389, Ballinger's Code, provide for the filing of a plat "of so much of the shore lines of the waters of the state and of the lands contiguous thereto, as are **proposed to be appropriated** for said purposes by said corporation."

The use of the words "proposed to be appropriated" makes it clear that the filing of the plat was simply for the purpose of giving notice to the world of the intention of the company. It was the initial step in the acquisition of such rights as such a corporation may acquire under these statutes. It was such notice as the legislature deemed necessary for the protection of the public and private individuals, interested in contiguous lands as well. Followed by appropriation and user the rights of the locator might culminate even in vested rights.

Under the irrigation statutes of some of the states, where it is sought to appropriate water, the filing of notices and of plats or maps, is required. The posting of notices and the recording of plats are held to be not conditions precedent to a valid appropriation of water but, simply, for the purpose of apprising other persons contemplating the diversion of water from the same stream that the appropriator has taken the first steps towards securing his rights and to preserve evidence thereof.

XVII Ency. of Law, 498.
Wells vs Mantes, 99 Cal. 583.
Walden vs Saldenbeher, 101 Cal. 107.
Senior vs Anderson, 115 Cal. 496.
Murray vs Tingley, 20 Mont. 260.

In this case the intention to appropriate never culminated in an overt act. The area in dispute remained open to the world and unoccupied for more than three years after the Nicomen plat was filed.

The basis of the decision of the court below in reversing the trial court is that the filing of the plat constituted an appropriation. Confounding the intention to appropriate, the notice of appropriation

with the act of appropriation itself, it is argued that a property right was acquired, which could be divested only by the exercising of the right of eminent domain, or by **quo warranto** or by non-user for the original statutory period of ten years. The position seems to be that the first boom company upon the river can, whether necessity exists therefor or not, by filing a plat covering the entire boom area of the river and by actually occupying a fraction of its platted area, prevent other boom companies from thereafter occupying the unused platted area. This is the assertion of an exclusive right.

"An exclusive right to enjoy a certain franchise is never presumed and unless the charter contains words of exclusion it is **impairment** of the grant to permit another to do the same thing, although the value of the franchise of the first grantee may be wholly destroyed."

Charles River vs Warrenburg, 11 Pet. 20.
Washington vs Maryland, 3 Wall. 310.
Pearsall vs Great Northern, 161 U. S. 664.

"No law shall be passed granting to any citizen, class of citizens or corporation, other than municipal, privileges or immuniies which, upon the same terms, shall not equally belong to all citizens or corporations."

State Constitution, Article I., Sec. XII.

"Monopolies and trusts shall never be allowed in this state."

Ibid, Article XII., Sec. 22.

Wood vs Seattle, 23 Wash. 20.

Neither boom statute reports to grant an ex-

clusive right to first boom companies upon any river. On the contrary, each recognizes that there can be more than one boom company operating a river by providing for the passage of logs from upper booms through those below.

Sec. 4382, Ballinger's Code.

"It is a rule applicable to all public grants in derogation of public rights that the same shall be strictly construed in favor of the public and against the grantee."

Charles River Bridge vs Warren, 11 Pet. 422.

"Where rights are claimed against the state, they must be so clearly defined that there can be no question of the state to confer them."

Leavenworth vs United States, 92 U. S. 733.
Barden vs N. P. R. Co., 154, U. S. 325.

It is not claimed that the boom statutes are ambiguous and that it is necessary to place a construction upon them for that reason. Attention is called to the rule that exclusive rights are never presumed to be granted, that every intendment which can reasonably be made, is against the party claiming exclusive rights and the constitutional prohibition against exclusive grants, to show that the mere filing of a plat, by which everything in sight could be claimed would not operate, standing alone and not followed by appropriation and possession, to confer exclusive rights to the territory thus located.

In the case of North Springs Water Co. vs Tacoma, 21 Wash. 517, the court says:

"The familiar rule that a privilege creating a monopoly cannot be given without the grant from the sovereign, the legislature, has been extended in

this state, and that power taken from the legislature by the Constitution; and Sec. VIII. of Article I. of the Constitution **supra**, is also pertinent in considering the general policy of the state."

The same court, speaking in State **ex rel** Spokane Telephone Co. vs City of Spokane, 24 Wash. 53, recognizing that exclusive franchises cannot be granted, says:

The argument against the power to grant an exclusive privilege is sound and is fully sustained in the rule announced by this court in North Springs Water Co. vs Tacoma, **supra,** but the question of the power to grant an exclusive privilege cannot arise here. If the city had attempted to grant such privileges to a telephone company so as to disable itself from consenting to the construction of another telephone system through its streets, such attempt would be void and beyond its power."

The only reasonable interpretation of these statutes is that the filing of a plat by a boom company is only effective as to such area as is necessary for its use and that it cannot obtain exclusive right by platting except as to such territory as is immediately followed by appropriation and possession. It cannot prevent competition by, at the same time, so extending its platted area as to include all other available boom sites.

Any other construction placed on the statutes runs counter to the Constitution; opposes the established public policy of the state and permits the self interest of the first corporation to determine whether it shall have competition in booming or not, besides, limiting the condemnation of property for boom purposes to what is necessary in the present and providing for the reversion of condemned property

upon non-user for one year is inconsistent with the position that the filing of a plat is anything more than mere notice of intention to appropriate.

PROPOSITION VI.

There is No Analogy Between the Filing of a Plat by Boom Company Under the Washington Statutes and the Filing of a Map by a Railway Company in Selection of its Route.

The court below, in sustaining the contention of the defendant in error, held that a boom company, being a public service corporation, has a preference right to construct a boom within its located territory, in analogy to the rights of a railway company, conferred by its selection of a route and that it has the right to anticipate the future needs of service for the public.

> Nicomen Boom Company vs N. S. Boom Company, 40 Wash. 315.

There is no analogy between boom companies and common carriers. A railway company engages in no business not open to all. A private individual may equip and own a railway. A charter confers upon the carrier corporation "powers" only. The right of way terminals, depot grounds, etc., of a railway corporation, are usually acquired by grant, modernly, absolute and in no case subject to be defeated or lessened except by abandonment, non-user and in rare instances, by a greater public necessity. Its property rights are corporeal.

The right to maintain a public boom on the waters of the state is not extended to individuals. Only boom companies can exercise that right and it is not open to all.

Healy Lumber Co. vs Norris, 33 Wash. 490.

The privilege conferred upon a boom company is a "franchise" as there can be no ownership, **in the corpus** of water, (Rigney vs Tacoma Light etc. Co., 9 Wash. 576.)

The boom company acquired only a license, a mere incorporeal right, a simple usufruct.

Atchison vs Peterson, 20 Wall. 507.

This incorporeal right is not acquired by grant but by appropriation and it is doubtful whether it can be alienated. In Samish River Boom Co. vs Union Boom Company, 32 Wash. 598, it was said that "boom companies are organizations of a peculiar character. Their operations are necessarily restricted to the waters of the state and in some cases, to a particular river."

The booming of logs is a species of navigation and the only essential of the boom area is floatability. The enclosure is a sort of anchorage and is only for the purpose of holding the floating logs for the purpose of sorting and rafting. The water sustaining the log for one instant is gone the next. The statute permits the boom company to charge tolls but these tolls are not permitted to be charged for the use of the river, but to compensate boom owners for their outlay, in erecting and maintaining works to facilitate the common use of the stream and to care for the logs coming within their limits. The boom acts do not, in effect, tend to change the character of the river as a common highway, nor to prevent any per-

son, who desires, from floating and booming logs upon it. The statutes do not assume to declare that any person shall not use the river, or be excluded from such common highway. The state does not attempt to barter the river away, but the most that can be said is that the regulation of driving logs, or more aptly and to the point,the regulation of the navigation of the river is sought. It is submitted that we must seek elsewhere for a proper analogy.

The incorporeal or usufruct in water may be acquired for mining, mechanical, agricultural or other useful purposes. Contrary to the common law, in the Pacific States at least, this right is acquired by appropriation and in a manner of procedure corresponding to that provided by these boom statutes. It is a mere possessory right, passes through no stages as the ripening of an inchoate title and is easily lost as by non-user, abandonment and other similar instances. The possession of a mining claim gives only a possessory right to the soil, but this may ripen into a fee simple title by a compliance with the mining statutes. The accompanying water rights are mere incidents easily lost. Title to water may aptly be said to be title by "eternal vigilance" because of its very nature. The various steps required to appropriate water for beneficial purposes are similar to those required in the case of boom companies desiring to take "the waters of the state," as the filing of notice of the quantity claimed, the purpose, and under the irrigation statutes of some of the states, plats or maps must be filed and the procedure, generally, is analogous. The term "appropriation" as applied to water has a clear, distinct and well known meaning.

As we have seen, supra, the recording of plats is not a condition precedent to a valid appropriation of water, but is simply notice.

The essential elements entering into a valid appropriation of water are:

1, an intent to apply it to some beneficial use; 2, a diversion of the water, and 3, an application of it within a reasonable time.

Low vs Rizor, 25 Ore. 551.
Nev. Ditch Co. vs Bennett, 30 Ore. 59.
McDonald vs Bear R. Co., 13 Cal. 220.
Thomas vs Gerind, 6 Cal. 530.
Offield vs Ish, 21 Wash. 280.

One who conceives the purpose of applying water to some beneficial use **must act with diligence.**

Nevada Co. vs Kidd, 37 Cal. 316.

In Ophir etc. Co. vs Carpenter, 4 Nev. 534, the court says:

"Diligence is defined to be the steady application to business of any kind; constant effort to accomplish an undertaking. The law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary and reasonable. It is the doing of an act or series of acts with all practical expedition, with no delay except such as may be incident to the work itself. The law then requires the grantors of the defendants to prosecute the work necessary to an execution of the design with all practical expedition."

The rule in Colorado is thus stated in Farmers etc. Co. vs Southworth 13, Col. 111:

"There must be not only a diversion of the waters from the natural stream, but an actual application of it to the soil to constitute the constitutional appropriation recognized for irrigation."

In the case at bar, the defendant in error filed its plat and survey on April 5, 1903. This was notice of the territory it intended to appropriate and use. Upon filing this plat, it, immediately and diligently, proceeded to make an appropriation by enclosure and use, but the area reduced to such possession and use and, therefore, actually appropriated, was not more than one-fourth of the territory located by the maps and survey. It completed its boom as **then contemplated,** put in its rudder sheer, stopped further work of construction and entered upon its business of booming logs. No act of further appropriation was attempted by defendant in error for more than three years, thereafter and only after plaintiff in error had filed its survey and plat. Whatever may have been the rights of the defendant in error during this period of three years, by reason of its failure to act, the plaintiff in error became the prior appropriator of the territory in dispute.

In Ophir etc. Co. vs Carpenter, **supra,** it appeared that a person desiring to convey water from a river to a village, gave notice of the appropriation of all its waters, in 1858 constructed a ditch more than four miles in length and of varying depth and width and in the year following used it for the purpose of conveying water to such village and other purposes. Some **three years later** he enlarged the ditch so as to increase its capacity ten-fold. In the meantime other persons had entered upon an enterprise, looking to

the diversion of water from the same stream, and the first appropriator claimed that he had a prior right to all the water carried by his enlarged ditch on the ground that **he had at all times intended** such enlargement and had proceeded with reasonable diligence to carry out his plans. It was shown, however that the work prosecuted by him during the three years succeeding 1858, consisted chiefly in clearing out the existing ditch. It was held that the persons who, during the **period of inactivity** of the first appropriator, entered upon the work of a second appropriation and prosecuted it vigorously and diligently, acquired rights against which the subsequent enlargement of the ditch of the first appropriator could not prevail.

And under the title, "Right to Appropriate Water Generally," Sec. 493, Ballinger's Code of Washington, in defining the duties of the appropriator, the statute recites; "it being herein expressly provided that such works must be diligently and continuously prosecuted to completion, unless temporarily interrupted by the elements."

"An appropriation cannot be constructive because there would be no rule to limit or control it, resting, as it must, only in intention."

Kelley vs Natouna, 6 Cal. 108.

"A land owner who has appropriated water for use upon his land is restricted to such use and cannot after the amount has become fixed by the use, increase it to the detriment of subsequent intervening appropriators, either by purchase and placing under cultivation an additional amount of land, or by selling the surplus to be used by others."

Senior vs Anderson, 115 Cal. 496.
Union etc. Co. vs Dangfield, 81 Fed. 73.
Becker vs Marble, C. I. Co., 15 Utah, 225.

And there are many cases which hold that so much of the water as the appropriator has not applied must be regarded as having never made any valid appropriation for.

McKinney vs Smith, 21 Cal. 384.
Senior vs Anderson, 115 Cal. 496.
New Mercer D. Co. vs Armstrong, 21 Col. 357.
Columbia Co. vs Holter, 1 Mont. 296.
Alder etc. Co. vs Hays, 6 Mont. 38.
Simmons vs Winters, 21 Ore. 35.
Hindman vs Risor, 21 Ore. 112.
Wheeler vs Irrigation Co., 10 Col. 582.
Butte vs Vaughn, 11 Col. 154.

All of the cases cited in the brief of the defendant in error and referred to by the court below in making its decision as to the effect of the filing of the map and survey, are railway cases and related to a different species of property rights and an entirely different method of acquiring the same.

As has been said, the ownership of the corpus of water cannot be acquired in appropriating waters of the state, the title is not divested and only the usufruct passes.

In the case of the railroad the location of the line is the initial step in a proceeding to acquire the right of way; the location itself confers no title but by following it with the further acts required by the statute, it may ripen into a title absolute to all intents and purposes.

In the case at bar the defendant in error had a

mere license to go upon the waters of the state and the filing of its plat was simply notice of its then intention, of the waters it intended to appropriate, as is stated in the boom statutes. It simply failed to do all it gave notice of its intention to do.

The court below held that the defendant in error in appropriating the waters of the state might take into consideration the future growth of the logging business. If it had such right, that is, to locate territory sufficient not only for present use but for future needs as well, it would not follow such proposed taking by an actual appropriation. It would not reduce the territory required in the future to possession and use. And here the analogy of railroad cases is discarded. While the railroad may condemn land sufficient not only for the present but for future requirements, it must condemn for both purposes and pay for the land taken before it acquires title, although much of it may not be used for years. There can be no non-user of what has never been reduced to a use; nor can one forfeit and abandon a thing never in possession. So long as the water in question was unappropriated, a part of the public domain, as it were, it was open to appropriation to any one who could secure the permission of the Secretary of War, and such appropriation would not violate the police regulations of the state. The defendant in error slept upon its rights and opportunities and the plaintiff in error became the prior appropriator.

PROPOSITION VII.

The Boom of the Plaintiff in Error Was Not an Unlawful Structure.

The court below held that the North Shore Boom and Driving Company's boom was an unlawful structure. The plaintiff in error has been in possession of the disputed territory and operated its boom for more than five years. The United States government has never complained. This is not an action to abate a public nuisance but is simply one for the trial of the right of two private corporations to the possession of a portion of North River. It is not claimed that the North Shore boom interferes with the navigation of North River, nor that the respondent has acted in defiance of the U. S. authorities. In three cases, U. S. vs R. G. Irrigation Co., 174 U. S. 690, Cummings vs Chicago, 188 U. S. 410 and Montgomery vs Portland, 190 U. S. 89, the moving party was the sovereign, itself, and the question involved in each case related solely to the exercising of its police powers by the state.

If an United States statute has been violated or the Federal assent has not been, in fact, given, and is only colorable, only the Federal Government can complain.

Manuel vs Wulff, 152 U. S. 505.
McKinley C. M. Co. vs A. U. M. Co., 183 U. S. 563.

The latter case is especially in point. The mining

statutes of the United States require that the locator of a mining claim shall be a citizen of the United States, or have declared his intention to become such. There was no evidence that the locators of the mining claim in question were citizens of the United States, and it was claimed, therefore, that the location was not valid just as it is claimed in this case that the permission of the Secretary of War has been only colorably given.

Upon this contention, in the case referred to, this court has said:

"The appellants, however, deny the application of Manuel vs Wulff, **supra**, and contend that this suit having been brought under Section 500 of the Oregon Code, in order to maintain the suit, the appellees must show a right to the exclusive possession of the ground in dispute. This is in effect to say that while the validity of the location may not be disputed by appellants, that the right to possession, which is but an incident to the location, may be. We do not concur in this view. The meaning of Manuel vs Wulff is that the location by an alien and all of the rights following from such location, are voidable, not void, and are free from attack by anyone excepting the government."

Tersely put, this case was decided in favor of the defendant in error by the Supreme Court of the State of Washington upon the sole ground that the filing of its plat and survey by the defendant in error, constituted the location and appropriation of all the territory described in the plat and the decision is based wholly and solely upon that one fact. Upon any view of the merits of the case, whether as a Federal ques-

tion alone, or, as a general legal proposition, this decision was palpably wrong and it is confidently submitted that the decision of the Supreme Court should be reversed and the judgment originally rendered by the Superior Court of the County of Pacific should be affirmed and the bill dismissed.

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NO. 20762

IN

The Supreme Court

of the United States

OCTOBER TERM A. D. 1907
NO. 359

NORTH SHORE BOOM & DRIVING COMPANY,
Plaintiff in Error,
v.
NICOMEN BOOM COMPANY,
Defendant in Error.

Brief of Plaintiff in Error Against Motion to Dismiss Writ of Error.

STATEMENT

This controversy had its origin in the Superior Court of the State of Washington, in and for the County of Pacific, its object being injunctional relief against the plaintiff in error, defendant below, in the occupancy of a certain portion of the navigable tide waters of North River, an arm of the Pacific Ocean, for boom and log driving purposes.

The trial court denied the relief prayed for and an appeal was taken. On hearing, *de novo*, in the

Supreme Court of the State of Washington, this decree and judgment was reversed and the cause remanded with instructions to make conclusions of law and to enter judgment as prayed for in the complaint.

Thereupon the trial court restated its conclusions of law and made and entered its decree, adjudging the plaintiff, defendant in error, here, entitled to the possession of the entire river from its mouth and for a considerable distance up-stream, and excluded the defendant, plaintiff in error, here, therefrom, without exception.

On the next day, January 17, 1906, on application of plaintiff in error, Chief Justice Mount, of the Washington Supreme Court, allowed a writ of error to this Court, directed to the judgment of the Washington Supreme Court, and a supersedeas conditioned upon an approved bond in the sum of $10,000, which was duly given.

A return was made to this Court, the record was printed and the final hearing was fixed for March 11, 1907. Returnable on the same day was a motion made by defendant in error, asking that said writ be dismissed, on the ground, among others, that the said judgment of the Washington Supreme Court, to which it was directed, was not a final judgment. Counsel on both sides disagreed in their opinions upon this question and as a matter of precaution, large interests being involved, the plaintiff in error, on the day set for said hearing, procured the dismissal of its said first writ of error.

On March 13, 1907, two days later, the plaintiff

in error made application to Chief Justice Hadley, of the Washington Supreme Court, for its second writ of error, but directed to the judgment of the trial court, made and entered on January 16, 1906, in obedience to the mandate of said Supreme Court. The record being in the State Supreme Court, the return to this writ of error was made by that court. Chief Justice Hadley also granted an order of supersedeas, conditioned upon an approved bond of $20,000, which was duly given.

On July 25, 1907, the parties to this action by their respective attorneys, entered into a written stipulation, duly filed in this court, to the effect that, so far as applicable, the printed record filed under the first writ of error, should have added the proceedings subsequent thereto, and that the same should constitute the printed record upon the second writ of error. The printed record was duly filed in this Court in accordance with this stipulation.

The facts developed upon the trial, and upon which the questions of law arise, are these, as appears from the Findings of Fact, made by the trial Court, and found at page 310 of the printed record, to-wit:

That the defendant in error is a corporation of the State of Washington, organized on March 19, 1900, for booming logs and other timber products; that on April 5, following, it filed its plat of location, showing that it proposed to appropriate, practically, all of the shore lines and waters of North River and contiguous lands, available for boom purposes, designating them; that before be-

ginning the construction of its boom, it submitted a plan of its proposed improvements and a plat of the territory to be occupied thereby to the Secretary of War of the United States, and was granted the Federal permission or license to construct the same; that it acquired the tide and shore lands contiguous to its location, along the left bank of the river, reckoning down stream; that it immediately proceeded to erect boom works along the left side of the river as far as it cared to operate at the time, but stopped a mile or more short of the upper end of the territory covered by its plat of location; that the boom works consisted of dolphins driven near the center of the stream, about 40 feet apart, connected with boomsticks to form an enclosure, with a sheer boom a short distance above the upper dolphin, movable and anchored to the shore on the right bank of the river, so constructed as to intercept all logs coming down the river and to shunt them into the boom, and that this boom was never actually constructed beyond this sheer boom.

That more than three years later, to-wit: on August 26, 1903, the plaintiff in error, defendant below, was organized and incorporated under the laws of the State of Washington, both as a boom and a driving company; that on the same date it filed with the Secretary of State, in the manner prescribed by law, its plat and survey of location, showing the water and shore lines and contiguous lands which it proposed to appropriate for boom and driving purposes; that before beginning any work of construction it applied to the secretary of

war for permission to build a boom within the limits of its said plat of location and was duly granted license thereto, in the manner usual in such cases, by that official; that the several plats of location filed by the plaintiff in error, covered, substantially, the portion of the territory within the location of the Nicomen Boom Company lying above the upper end of its sheer boom; that the plaintiff in error, at the time, acquired the tidelands and fast lands within its plat of location along the right bank of the river and on the opposite side from the works of the defendant in error; that shortly after its incorporation, the plaintiff in error began the construction of its boom, within the limits of both plats of location about 1500 feet above the said sheer boom of the defendant in error, driving its first piles on September 4, 1903; that up to that date, no structure of any kind had been erected by defendant in error within the limits of the territory so located and occupied by the plaintiff in error, nor was any part of said territory in the actual possession of, or occupation by the defendant in error; that the construction of the two booms is practically the same; that the plaintiff in error has not erected any improvements or structures on any part of the uplands or tide-lands belonging to defendant in error, nor are these lands rendered less accessible, and the line of dolphins constituting the boom of plaintiff in error are constructed on the opposite side of the river; that the sheer boom and receiving boom of the plaintiff in error are so constructed as to allow free passage between same and the opposite shore for all boats, vessels or steam craft plying on the river

for the ordinary purposes of navigation: **that both booms as constructed can be operated without interfering with Navigation on North River** and that the boom of plaintiff in error is so constructed that it can, without unreasonable delay, pass logs and other timber products consigned to the boom of the defendant in error.

That the trial court, as conclusions of law, found that the defendant in error had not appropriated the territory covered by the plat of the plaintiff in error; that the boom of the plaintiff in error was a lawful structure; and that the area occupied by it was rightfully in its possession.

The several statutes of the State of Washington, relating to and authorizing the construction of booms and the driving of logs, are as follows:

S 7111. Any corporation heretofore or hereafter organized in the State of Washington for the purpose of catching, booming, sorting, rafting, and holding logs, lumber or other timber products, shall have power to acquire, hold, use and transfer all such real and personal property or estate, by lease or purchase, as shall be necessary for carrying on the business of said corporation. If such corporation shall not be able to agree with persons owning land, shore rights, or other property sought to be appropriated, as to the amount of compensation to be paid therefor, the compensation therefor may be assessed and determined and the appropriation made in the manner provided by law for the appropriation of private property by railways: *Provided*, that any property acquired under the provisions of this act by the exercise of the

right of eminent domain shall be used exclusively for the purposes of this act; **and whenever the use of said property as herein contemplated shall cease for a period of one year,** the same shall revert to the original owner, his heirs or assigns, upon the repayment of the original cost of same.

P. C. 7111; B. C. 4378. I. H. C, 1590.

S. 7112. Any corporation hereafter organized for the purpose mentioned in section one of this act shall, within ninety days after its articles of incorporation have been filed, proceed to file in the office of the Secretary of State a plat or survey of so much of the shore lines of the waters of the state and lands contiguous thereto as are proposed to be appropriated for said purpose by said corporation. Any corporation heretofore organized in the Territory of Washington for any of the purposes expressed in section one (1) of this act, shall file such plat within ninety days after the passage of this act. Such plat shall be made from the records of the United States in the Surveyor-General's office of this state, or by a competent surveyor, subsequent to actual survey.

P. C. 7112; B. C. 4379; I. H. C. 1691.

S. 7113. Such corporations shall have power and are hereby authorized, in any of the waters of this state or the dividing waters thereof, to construct, maintain and use all necessary sheer or receiving booms, dolphins, piers, piles or other structure necessary or convenient for carrying on the business of such corporation. *Provided*, That such boom or booms, sheer booms or receiving booms shall be so constructed as to allow the free passage

between any of such booms and the opposite shore for all boats, vessels or steam crafts of any kind whatsoever, or for ordinary purposes of navigation.

P. C. 7113; B. C. 4380; I. H. C. 1592.

The state statutes as to driving companies are found in Pierce's Code of 1905, Sections 7120 to 7127, inclusive. Section 7126 is as follows:

S. 7126. Should any corporation neglect for the period of eight months after improving any stream or river, to operate its dams, or to otherwise perform its duties as herein provided, then all rights herein conferred upon such corporations upon such streams or rivers, or any portion thereof, shall cease.

POINTS, AUTHORITIES AND ARGUMENTS

U. S. STATUTE.

"By the 7th section of the river and harbor act of Congress, approved September 19th, 1890, Chap. 907, it was provided: 'That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any state, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge-draw, bridge piers, and abutments the construction of which has been heretofore duly authorized by law, or to be so construed as to authorize the construction of any bridge, drawbridge,

bridge piers and abutments, or other works, under an act of the legislature of any state, over or in any stream, port, roadstead, haven, or harbor, or other navigable water not wholly within the limits of such state.'" 26 Stat. at L. 426, 454.

Both boom companies were incorporated long after the passage of the Act of Congress of September 19, 1890, and both recognized the authority of Congress by securing permission from the Secretary of War to erect their respective boom structures. If either company had attempted to erect its boom without the Federal assent, it would have been very promptly stopped and ejected from the river by the Secretary of War. Hence, the authority of any person to thus occupy this stream is **wholly a Federal question,** whether the right questioned is under the Federal or State statutes.

This position is made entirely clear by the language employed by Mr. Justice Peckham in the case of United States vs. Bellingham Bay Boom Company, 176 U. S., at page 218, in construing the U. S. Statute of September 19, 1890, and we quote his words in full as to the Federal character of the question involved:

"If there were no Federal law in existence, then the question whether the boom was authorized by a state law, or complied with its provisions, would be a state question, as is clearly set forth in the above extract. But the Federal law having been passed, the question then is whether the structure is permitted by that law, and when that law says it may continue, if affirmatively authorized by a state law,

the question whether it is so authorized becomes in effect a question whether the Federal law does or does not permit it. **If it is authorized by the state law, then the Federal law provides that it may continue; and whether it is or is not, becomes a question for the Federal Court to decide.**"

Comment could not make the question of jurisdiction clearer or more emphatic.

The case of Commings vs. Chicago, 188 U. S. 410, involved the right to construct a dock in a navigable river by the riparian owners, in opposition to a police regulation by the state, but having the Federal assent. The plaintiffs, citizens of Illinois, filed their bill to enjoin the City of Chicago from interfering with the construction of the dock in the Calumet River.

The defendant demurred to the bill upon the ground that it did not state facts entitling the plaintiffs to the relief asked and the objection that no Federal question was involved was raised as in the case at bar. Mr. Justice Harlan disposed of this contention in the following very terse paragraph, at the outset of his opinion, after stating the facts:

"We hold that the circuit court had jurisdiction in this case. That the parties, plaintiffs and defendants are citizens of the same state is not sufficient to defeat the jurisdiction; for by the act of March 3d, 1887, chap. 373, as corrected by the act of August 13th, 1888, chap. 866, the circuit courts have jurisdiction, without reference to the citizenship of the parties, of suits at common law or in equity arising under the constitution or laws of the United States. 24 Stat. at L. 552, 25 Stat. at L.

433 (U. S. Comp. Stat. 1901, p. 508). The present suit does arise under the Constitution and laws of the United States, because the plaintiffs base their right to construct the dock in question upon the Constitution of the United States, as well as upon certain acts of Congress and the permit (so called) of the Secretary of War, which legislative enactments, and action of the Secretary of War were, it is alleged, in execution of the power of Congress, under the Constitution, over the navigable waters of the United States. Clearly, such a suit is one arising under the Constitution and Laws of the United States. That it is a suit of that character appears from the bill itself. The allegations which set forth a Federal right were necessary in order to set forth the plaintiff's cause of action."

The Findings of Fact, made and entered by the trial court, found on page 310 of the printed record, constitute the pleadings and case upon which a trial *de novo* was had before the Supreme Court of Washington, according to the practice in that state. Paragraph III, at page 311 of the printed record, recites that before beginning the construction of its boom, the defendant in error, plaintiff below, was granted permission by the war department to construct its said boom; and Paragraph VII, printed record, page 312, recites that plaintiff in error, defendant below, had a similar permission. Both parties recognized the necessity of a license from the Federal authorities and thus acknowledged Federal jurisdiction, thereby conceding that the abstract right to occupy the navigable waters of the United States, especially to the exclusion of others, is, necessarily, a Federal question. In its

opinion, printed record page 372, sixteenth line, the Supreme Court of Washington, referring to defendant in error, plaintiff below, states that," * * Before beginning the construction of its boom, it submitted to the secretary of war of the United States a plan of its proposed improvements and a plat of the territory to be occupied thereby, and was by said war department granted permission to construct a boom within the limits of said river covered by said plat of location. The territory designated by said plat of location embraces the shores of North River, which river is tributary to Willapa harbor, a bay leading into the Pacific Ocean, and the territory extends from near the mouth of the river on both sides for some distance up the stream."

As to the position of the plaintiff in error, defendant below, as to the Federal assent, the same court says at page 373, eleventh line:—

"It also claims that before commencing to construct its boom, it secured from the war department of the United States permission to construct within its said location. The plat of location filed by the defendant in the office of the secretary of state covered substantially the part of the territory embraced in the plat of the plaintiff, lying above the upper end of the sheer boom constructed by plaintiff as aforesaid."

And it further appears from the opinion, page 379, fourteenth line from bottom, that the court declined to consider whether plaintiff in error, defendant below, even had permission from the secretary of war to construct its boom.

It has been held by this court that the erection of a structure in a navigable river, within the limits of a state, depend upon the concurrent or joint assent of both the national government and the state government. The Secretary of War, acting under the authority conferred by Congress may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them.

Cummings vs. Chicago, 188 U. S. 410.
Montgomery vs. Portland, 190 U. S. 89.

As the authority over the navigable waters of the United States is paramount in Congress and any voice in their control by the states is only by the grace of Congress, which may be withdrawn at any time, as to what constitutes the assent of a state, to be concurrent with national assent, is *ipso facts*, a Federal question. To say that the assent of the state, in such cases, is purely a local matter and can only be decided by the state courts, and that in any controversy similar to this, the United States Courts can decide only as to whether there has been the necessary Federal assent, would lead to the most palpable absurdities.

The third assignment of error, laid by the plaintiff in error, is, in effect, that when the Secretary of War gave his permit or license to construct its boom, that such act was a revocation of so much of the permit or license granted to the defendant in error, three years before, as was covered by or included in the permit or license thus granted to the plaintiff in error.

The authority of the Secretary of War under the

act of Congress of September 19, 1890, the effect of his assent to the erection of structures in navigable waters and the estate granted thereby, whether revocable, and if revocable whether revocable by implication, and whether such assent carries with it vested rights, are, also, from their very nature, all Federal questions and in no sense purely local and of state concern only.

That a Federal question was involved, and no other, appears on the face of the opinion of the Supreme Court of Washington. (Printed record, page 372.)

It was the contention of the plaintiff in error, defendant below, that the Nicomen Boom Company had appropriated only so much of its located territory as it had reduced to actual possession and use for boom purposes, and that having allowed the remaining territory to lie idle, unused and unappropriated, it had abandoned the same, and that, therefore, it did not have the state assent.

But, as we have seen, the exception in the act of Congress is a structure authorized by a state law. In any case in which the Secretary of War might be called upon to exercise his authority under this statute, then, he must ascertain *first*, whether the state has taken jurisdiction, and, *second*, whether the conditions prescribed by the state had been complied with and amounted to an assent. If the Secretary of War must decide these matters, before he can act and to govern his action, they must be solely Federal questions. In this case, as the Secretary of War granted a license to the plaintiff in error to construct its boom within

territory not actually appropriated by the defendant in error and unused by it, he must have decided that the Nicomen Boom Company did not have the state assent at that time, whatever may have been the case three years before. If the territory occupied by the boom of plaintiff in error was unappropriated at the time it made its location then it had the state assent, as the state boom law is self-executing. The Washington Supreme Court held that the filing of a boom plat was analogous to the filing of a plat for right of way by a railroad corporation which would hold the location until actual abandonment and that therefore the defendant in error had the state assent and that plaintiff in error did not have such assent. This was the sole question in the case and from its very nature could only be a Federal question.

Blythe vs. Hinckley, 180 U. S. 333.

Am. Sugar R. Co. vs. Louisana, 179 U. S. 89.

Douglass vs. Wallace, 161. U. S. 346.

This Court, in Armstrong vs. Athens County, 16 Peters 281, states the principles by which its jurisdiction is governed in six paragraphs, the last of which reads as follows:—

"*Sixth.* It must appear from the record that the question was necessarily involved in the decision; and that the state court could not have given the judgment or decree, which they have passed without deciding it."

This case is cited in many cases, notably the following:

Moore vs. Mississippi, 21 Wall, 638.
Murray vs. Charleston, 96 U. S. 442.
Crossley vs. New Orleans, 108 U. S. 105.
Weatherby vs. Bowie, 131 U. S. ccxv.
Kaukauna vs. Green, B. C. 142 U. S. 69.
Gulfte R. R. vs. Hewes, 183 U. S. 269.

In Murray vs. Charleston, 96 U. S. 442, the rule is still more forcibly stated:—

"The true test of the jurisdiction of this court over state judgments is not whether the record exhibits an express statement that a Federal question was presented but whether such a question was decided and decided adversely to the Federal right."

Anderson vs. Carkins, 135 U. S. 483.

If it appears from the record by clear and necessary intendment that the Federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient to give jurisdiction.

Powell vs. Brunnswick Co., 150 U. S. 433.

It is not necessary that the treaty or act of Congress on which the Federal right is based should have been pleaded specially or spread upon the record. It is sufficient if the record shows that it must have been construed.

McCullough vs. Virginia, I72 U. S. 118.

Where a decision by the state Court of the Federal question appears to have been the foundation of the judgment a writ of error lies.

Wedding vs. Weyler, 192 U. S. 573.

Other cases in point, generally, are the following:

Covington vs. Sanford, 164 U. S. 595.

Mitchell vs. Clark. 110 U. S. 645.

Boyd vs. Nebraska, 143 U. S. 180.

Des Moines vs. Iowa H. Co., 123 U. S. 555.

Erie R. Co. vs. Purdy, 185 U. S. 148.

Snell vs. Chicago, 152 U. S. 191.

Muter vs. Montgomery, 156 U. S. 385.

Walter A. Wood Co. vs. Skinner, 139 U. S. 295.

Cook Co. vs. Calumet Dock Co., 138 U. S. 365.

C. B. &. Q. R. vs. Chicago, 166 U. S. 228.

THE STATE DECISION VIOLATES 14TH AMENDMENT

The navigable waters of the United States are not at the disposal of a contiguous state. The state may exercise police power, it may improve when not in conflict with plans of the general government, its courts may exercise jurisdiction over maritime contracts, *in personam*, and to a limited extent it has some powers, but that the authority of congress, in all substantive matters, is paramount and supreme is not possible of denial.

The decree of the Supreme Court of Washington awards to the defendant in error, not the located territory provided by the state boom statute leaving an unobstructed passage-way for commerce, **but the entire river from its mouth to the head of tide water** and excludes the plaintiff in error therefrom, without exemption, notwithstanding the fact that it is, also, a driving company and in spite of the inhibition of the State Constitution against the granting of exclusive rights and the conferring of a monopoly.

This decree vests the defendant in error with a monopoly upon one of the most important highways on the Pacific Coast and is in violation of the 14th Amendment.

That the decree violated the 14th Amendment in this respect was specially urged in the petition for re-hearing, and was denied by the court and thus a second Federal question was raised.

Minn. & St. L. R. C. vs. Minnesota, 193 U. S. 53.

GRANTING A SECOND LICENSE REVOKED THE FIRST LICENSE.

The Secretary of War granted a license to the defendant in error to construct its boom in North River. Three years later, three-fourths of the territory thus granted being vacant and unappropropriated, the Secretary of War granted a similar license to the plaintiff in error to occupy a portion of such unappropriated territory with a boom.

It is confidently submitted that this action by the Secretary of War is two-fold in effect:

First. It was an adjudication or finding, by a competent Federal official, that defendant in error did not have the requisite authority from the state to occupy the disputed territory; and

Second. The granting of the second license was a revocation of the first license.

Nichols vs. Peck, 70 Con. 439.
Wilson vs. St. Paul R. R., 41 Minn, 56.
Hazleton vs. Putnam, (Wis.) 3 Pin. 107.
Johnson vs. Skillman, 29 Minn. 95.
Dunham vs. Joyce, 129 Mo. 5.
Fischer vs. Johnson, 106 Ia. 181.

But these are all Federal questions and properly come within the jurisdiction of this Court upon appeal.

JURISDICTION, NOT MERITS, THE ISSUE.

This court will not weigh or decide the whole legal merits on this motion to dismiss but will inquire into them only as settling the question of jurisdiction; nor will it grant this motion where its consideration requires a consideration of the entire merits.

Minor vs. Tillotson, 1 How. 287.
Day vs. Washburn, 23 How. 309.
Hecker vs. Fowler, 1 Block, 95.
Semple vs. Hager, 4 Wall 431.
Lynch vs. DeBernal, 131 U. S. 94.
Bohanan vs. Nebraska, 118 U. S. 231.
Hill vs. C. & E. R. 129 U. S. 170.
Chicago L. Ins. Co. vs. Needles 113 U. S. 574
Cent. Land Co. vs. Laidley 159 U. S. 111.
Eureka L. & Y. C. Co. vs. Superior Ct. 119 U. S. 410.
Kaukauna W. P. Co. vs. Green B. & M. C. Co., 142 U. S. 269.
Board of Liquidation vs. Louisiana, 179 U. U. S. 622.

THIS MOTION IS A MISCONCEPTION

The position of the defendant in error upon this motion is put in a nutshell in Paragraph V, of its Points and Authorities, at page 17 of its brief.

It assumes that what constitutes "state authority or assent" is purely a matter of "local and state law," while we have seen in United States vs. Bellingham Bay Boom Company, *ante*, that it is wholly a federal question. And the cases cited, Cummings vs. Chicago and Montgomery vs. Portland, decide exactly the reverse of what is claimed for them in the brief.

NOTICE OF WRIT OF ERROR WAS GIVEN

The last ground of the motion to dismiss the writ of error for the reason that no citation had been served upon the defendant in error is untenable and without any basis in fact.

1. On March 26, 1907, the Sheriff of Pacific County personally served the defendant in error with a notice signed and issued by the Chief Justice of the Supreme Court of Washington which, omitting the venue and title, was as follows:

"A petition for a writ of error having been granted to the Supreme Court of the United States, the said writ of error being returnable on the twelfth day of May, A. D. 1907, from a judgment rendered in the Superior Court of the State of Washington, in and for the County of Pacific on the sixteenth day of January, A. D. 1906, in obedience to the mandate of the said Supreme Court of the State of

Washington, issued on the sixth day of December, A. D. 1905, in favor of the appellant, Nicomen Boom Company and against the respondent, North Shore Boom and Driving Company, reversing the former judgment and decree of the said Superior Court of the State of Washington, in and for the said County of Pacific, and directing a judgment and decree in favor of the appellant Nicomen Boom Company in accordance with the prayer of its complaint and the said respondent, North Shore Boom and Driving Company, having executed and filed its supersedeas bond in the sum of twenty thousand dollars and the same having been by me approved,

Therefore, the appellant, Nicomen Boom Company and all others are commanded to stay proceedings on said judgment and decree.

Witness my hand this 20th day of March, A. D. 1907.

(Seal of the Supreme Court, State of Washington)

HIRAM E. HADLEY,
Chief Justice of the Supreme Court
of the State of Washington.

Every material fact of which the defendant in error would be apprised by the service upon it of a common law form of citation, is set forth in the above notice, no matter by what name it may be called. And the notice was emphasized by the command to stay all proceedings contained therein.

In Dodge vs. Knowles, 114 U. S. 430, the citation was not served but the appelle was served with an order directing him to appear and argue the case and this court held a citation unnecessary.

2. The object of a citation is notice and where sufficient notice has been given by a stipulation and motion it is unnecessary.

United States vs. Gomez, 1 Wall. 690.
Goodwin vs. Fox, 120 U. S. 775.

As long ago as July 25, 1907, the parties to this writ, by their several attorneys, entered into a stipulation in writing, filed in this court, providing for the printing of the record. (Printed record pp. 411-2.)

The plaintiff in error has furnished a printed record in this case at an expense of over $1500. In entering into the stipulation the defendant in error reserved the right to object to the jurisdiction of this Court and it had in mind, apparently, at that time, the making of this motion. This stipulation saved to it the trouble and expense of printing a record upon which to base its motion.

Nor do we doubt that a receipt, in writing, for the printed record in this case executed by defendant in error, was in the hands of the Clerk of this Court weeks before this motion was served.

3. A citation was actually issued, although it does not appear to be accompanied by proof of service. (Printed record, p. 411.)

This Court has repeatedly held that if a citation was actually issued but not served before the first day of the term to which it was returnable, leave might be granted to make the service during the term.

Dayton vs. Lash, 94 U. S. 112.
Richards vs. Mackall, 113 U. S. 539.
Peugh vs. Davis, 110 U. S. 227.

HEARING IN DE NOVO IN STATE APPELLATE COURT.

Under the practice of the State of Washington, the hearing of an equity case in the Supreme Court is *de novo*, and if not excepted to, the findings of fact of the trial court constitute the pleadings in the Supreme Court.

Cadwell vs. First Natl. Bk., 3 Wash., 196.
Stenger vs. Roeder, 3 Wash. 419.
Boyer vs. Boyer, 4 Wash. 81.
Kirby vs. Collins, 6 Wash 297.
Kane vs. Kane, 35 Wash. 573.
Caughey vs. Rien, 37 Wash. 298,

The findings of fact made by the trial court fully disclosed each step taken by the parties to this action and their several action in seeking to comply with the Federal statute licensing the obstruction of a navigable stream. Hence a Federal question appeared affirmatively upon the record and a decision of the case could not be made without deciding a Federal question.

In conclusion, it is respectfully submitted that every material question arising upon the record in this case is a Federal question and that there is absolutely no basis for the motion at bar.

W. H. ABEL,
CHAS. E. MILLER,
JAMES B. HOWE,
SAMUEL H. PILES,
Attorneys for Plaintiff in Error.

IN

The Supreme Court of the United States

No. 359

October Term, 1907

NORTH SHORE BOOM & DRIVING COMPANY,
Plaintiff in Error,

v.

NICOMEN BOOM COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of Washington.

Reply Brief of Defendant in Error on Motion to Dismiss Writ of Error

I.

In brief of plaintiff in error in opposition to our motion to dismiss, counsel tries to show the court that the Federal question which will authorize a writ of error

from this court to the Supreme Court of the state was involved in this case in the state court. To support this contention counsel cite three cases, to wit:

United States v. Bellingham Bay Boom Co., 176 U. S. 218;

Cummings v. Chicago, 188 U. S. 410;

Montgomery v. Portland, 190 U. S. 89.

The first two of these cases were cases commenced in the Circuit Court of the United States and the Federal question there considered was the question of the jurisdiction of the Federal Circuit Court, and not that with reference to a writ of error from the United States Supreme Court to a state court. The Federal question which will sustain the jurisdiction of the Circuit Court is entirely different from the Federal question which will sustain jurisdiction in a writ of error from the United States Supreme Court to a state court.

In the case of United States v. Bellingham Bay Boom Company, the court was construing the River and Harbor Act of 1890. Prior to the passage of this act, the Bellingham Bay Boom Company had constructed a boom in the navigable waters of the United States. The act in question provided:

"That the creation of any obstruction *not affirmatively authorized by law* to the navigable capacity of any waters in respect to which the United States has jurisdiction is hereby prohibited."

The section also made it an offense to continue any such obstruction, and expressly conferred jurisdiction upon the Circuit Court of an injunction to prevent the obstruction, and provided that proper proceedings in equity to that end might be instituted by the Attorney

General of the United States. The defendant in that case defended on the ground that their structure was authorized by a state law, and therefore came within the exception in the United States act above referred to contained in the words "not affirmatively authorized by law." The court rightfully held that the United States act incorporated within its provisions the state laws which had theretofore been passed with reference to structures in waters within a particular state's jurisdiction, and that therefore the question of whether or not a structure was authorized by the state law became a Federal question by reason of the recognition in the Federal statute of a structure authorized by a state law.

On page 215 the court said:

"When Congress in 1890 passed the River and Harbor bill, we think the expression contained in Section 10, in regard to obstructions 'not affirmatively authorized by law,' meant not only a law of Congress but a law of the state in which the river was situate, which had been passed before Congress had itself legislated upon the subject. An obstruction created under the authority of a state statute under such circumstances, we cannot doubt was an obstruction 'affirmatively authorized by law.' When, therefore, the section continues and provides 'that any such obstruction * * * whether heretofore or hereafter created,' shall constitute an offense, it referred to an obstruction as described in the first sentence of the section, namely, an 'obstruction not affirmatively authorized by law.' If the obstruction were affirmatively authorized by a law of the state, it did not come within the condemnation of the section, and its continuance was therefore valid."

Again, on page 217:

"When the Attorney General, therefore, acts upon the authority conferred by this statute, he has the right to call upon the court, upon proper proofs being made, to enjoin the continuance of any obstruction not authorized by the statute, and the court has jurisdiction, and it is its duty to decide the question whether the existing obstruction is, or is not, affirmatively authorized by law. In such inquiry the court is bound to decide whether the boom as existing is authorized by any law of the state. When such law is claimed to be a justification for its creation or its continuance, that question is not for the state alone, but must necessarily be decided by the Federal court *in the course of exercising the jurisdiction conferred upon it by the Federal statute.*"

The right in that case was, therefore, a right directly claimed under a Federal statute, because the Federal statute expressly recognized such right. But that is an entirely different case from the right involved in the present case. That case is undoubtedly correctly decided, and the jurisdiction with reference to which that case is decided was the jurisdiction of the Circuit Court of the United States expressly conferred by the River and Harbor Act, and not the jurisdiction of the Supreme Court to review the judgment of a state court. We doubt very much if an action involving a similar point, even under the wording of the River and Harbor Act then in force, had been presented in a case brought in a state court taken up through the Supreme Court of the state, in which the state courts had decided that the boom structure was not authorized by the state law—I say that we doubt very much if the denial of the party's right under the state law by the state court would have

presented such a Federal question as would have authorized the Supreme Court of the United States to review; but, irrespective of that question, we desire to call the court's attention to the fact that the River and Harbor Act of 1890 was not the River and Harbor Act in force and governing the question involved in the present litigation. The act construed in the Bellingham Bay Boom case was the act of 1890, and found in 26 St. L., at pages 426, 454. The act in question in the present case, however, was the act of March 3, 1899, which is more restricted.

Section 10 of the act of 1899, 30 St. L. 1151; 6 Fed. Stat. An. 813, provides:

"That the creation of any obstruction not affirmatively authorized by *Congress*, to the navigable capacity of any of the waters of the United States, is hereby prohibited." whereas, the act of 1890 prohibited any obstruction "not affirmatively authorized by *law*."

The act of 1899, therefore, does not incorporate into its provisions, as does the law of 1890, the state statutes authorizing obstructions within the waters within their boundaries, but excepts only the structures authorized by *Congress*. This latter act, however, has been interpreted by the Supreme Court as not assuming the exclusive jurisdiction over navigable waters of the United States within the boundaries of a state, but any obstruction in such waters must be authorized both by Congress, as provided in this act of 1899, and by the state authority; i. e., before any obstruction in a navigable water of the United States lying within the boundaries of a state is lawful, it must be authorized by Congress and also by the state authorities. Under this act, therefore, whether or not a person has obtained the

authority of the United States to build a structure, or, having obtained such authority, if a state court should hold that he had not obtained such authority, that question would be such a Federal question as would authorize a writ of error from the Supreme Court of the United States to a state court, provided a claim of such right under the act of Congress was made within the state court, and within the proper time. But the question of whether or not a person has obtained authority from the state, in any event since the passage of the law of 1899, we submit cannot interest the Federal authorities one way or the other; it is a matter purely between the state and the individual claiming a right under a state law, and a decision of a state court holding that a particular person had no authority under the state law to create an obstruction in a river within its boundaries, could present absolutely no question which would authorize a writ of error from the United States Supreme Court to the state court. Such a decision by the state court would not be a decision against any title, right, privilege or immunity specially set up or claimed by a party under the constitution, treaty, statute, commission, or authority exercised under the United States.

By the reading of the decision of the Supreme Court of the state, as pointed out in our opening brief, it will be seen that the state decision was simply to the effect that the defendant in error had acquired the prior right under the state law; had acquired such rights under that law as were exclusive, and that the plaintiff in error, by attempting to comply with the state law with reference to a portion of the stream where the defendant in error's rights were still valid, acquired nothing under the state law; i. e., the court's decision was simply a

holding to the effect that the plaintiff in error had acquired no right or authority under the state statute, and had, therefore, not acquired the state's assent to his structure in the river. The state court refused to pass upon the rights of the respective parties under the River and Harbor Act, because, in view of its holding with reference to the rights of the respective parties under the state law, that question was immaterial.

The other two cases cited were the cases of Cummings v. Chicago, 188 U. S. 410, and Montgomery v. Portland, 190 U. S. 89.

The case of Cummings v. Chicago was a case taken up through the United States courts. The case of Montgomery v. Portland was on writ of error to the state court. In neither of those cases was a right claimed under the state law denied. In the Cummings case the party had absolutely no permit or authority from the state, and was claiming entirely under his permit from the United States Secretary of War, and his permit under the United States authority was denied because he had not also secured some authority from the state.

In the Montgomery v. Portland case, the harbor line established by the United States authority extended out further into the river than the harbor line established under the state authority. Mo. mery, claiming the right to construct his wharf out to the extent of the harbor line established by the United States authority, was not denied any right under a state authority, because he had no state authority out beyond the line established by the state, and his right, which was denied in that case, was the right he claimed under the United States authority and not under the state authority; but in the present

case the denial of the right was not a denial of the right under the United States authority at all, for the court did not pass upon that question. But the authority which was denied, and which the plaintiff in error is now attempting to assert was the denial of a right under the United States statute, was the denial by the state of any right under the state statute.

We submit, therefore, that the cases relied upon by the plaintiff in error to establish the fact that a Federal question was involved, are not in point in the present case.

II.

The plaintiff in error has entirely failed to show that any Federal question was especially set up or claimed in the state court. We pointed out in our opening brief, at page 25, that the plaintiff in error had never set up or claimed a right under the statute which it is now attempting to claim under, and we called the court's attention to the state of the record. It is well settled by the long line of decisions that, in order to review in this court a state court's decision on the ground on which this judgment is attempted to be reviewed, the title, right, privilege or immunity claimed under the constitution, treaty, statute, commission or authority, must be specially set up or claimed in the state court to give the United States Supreme Court jurisdiction.

Home for Incurables v. N. Y., 187 U. S. 155;
Bollin v. Nebraska, 176 U. S. 83;
Telluride Power Transmission Co. v. Rio Grande Western Ry. Co., 175 U. S. 639.

The fact that Federal questions were discussed in the opinions of the state court gives no right to review in the United States Supreme Court, where no claim under the constitution, laws or treaty of the United States were presented to the highest court of the state.

Howard v. Fleming, 191 U. S. 126.

The attempt to review this action in the United States Supreme Court was an afterthought on the part of the plaintiff in error and not thought of until long after the decision of the State Supreme Court. As shown in our opening brief on this motion, at page 25, the plaintiff in error's original brief in the state court is not in the record, but its petition for rehearing is found at page 381 of the transcript, and by a perusal of which the court will readily see that not one mention of any claim or right under a Federal statute is made, and by the opinion of the State Supreme Court (transcript, page 372) it will be seen that the plaintiff in error raised no question whatever of any right or claim under a Federal statute. It is true that the defendant in error, who was the appellant in the State Supreme Court, raised the question of the plaintiff in error's right under the United States law, and the opinion of the Supreme Court shows this at page 397, where it says:

"*Appellant* further urges that the record shows that the respondent's (defendant in error) boom and location are not lawful, in that no sufficient permit has been granted to it by the War Department of the United States. For reasons above stated it is unnecessary that we shall examine that question."

But the raising of this question by the defendant in error in the state court cannot be availed of by the plaintiff in error, even if the State Supreme Court had decided that question, for the reason that this court has held that the question must have been raised in the state court by the individual who seeks to have it reviewed in the United States Supreme Court.

In Sully v. American National Bank, 178 U. S. 289, this court holds:

A plaintiff in error in this court must show that he has himself raised the question in the state court which he argues here, and it will not aid him to show that some one else has raised it while he himself fails to do so.

The only question raised in the state court, therefore, of the plaintiff in error's rights under the United States law, was raised by the defendant in error, and, as seen, the state court expressly refused to pass upon that question.

Furthermore, we desire to call the court's attention in this connection to the fact that in and by the pleadings no question on this score is raised by the plaintiff in error. The complaint sets up the defendant in error's title. (Transcript, page 287.) The answer is simply a denial of the title set up by the defendant in error. (Transcript, page 297; supplemental complaint, page 301; answer to supplemental complaint, page 302.) The plaintiff in error set up no claim whatever in the pleadings or in the record at all.

It has been held by this court that the title, right, privilege or immunity claimed must be personal to the plaintiff in error. He is not entitled to a review where the title, right, privilege or immunity was asserted by

the other party and the decision was in favor of that party and adverse to himself.

DeLamar's Gold Mining Co. v. Nesbitt, 177 U. S. 527, 528.

On page 19 of the plaintiff in error's brief, counsel says:

"This decree invests the defendant in error with a monopoly on one of the most important highways of the Pacific Coast, and is in violation of the Fourteenth Amendment; that the decree violated the Fourteenth Amendment in this respect was specially urged in the petition for rehearing, and was denied by the court, and thus a second Federal question was raised."

The Supreme Court of Washington denied the petition for rehearing without argument and without opinion. (Transcript, page 381.)

This court has repeatedly held that it is not sufficient to make a claim under a statute or the constitution of the United States for the first time in a petition for rehearing after judgment, but that the same must be presented fairly and squarely to the state court at the proper time.

Mutual Life Ins. Co. v. McGrew, 188 U. S. 309;
Turner v. Richardson, 180 U. S. 92;
Capital National Bank v. Cadiz National Bank, 172 U. S. 425;
Myer v. Richmond, 172 U. S. 82.

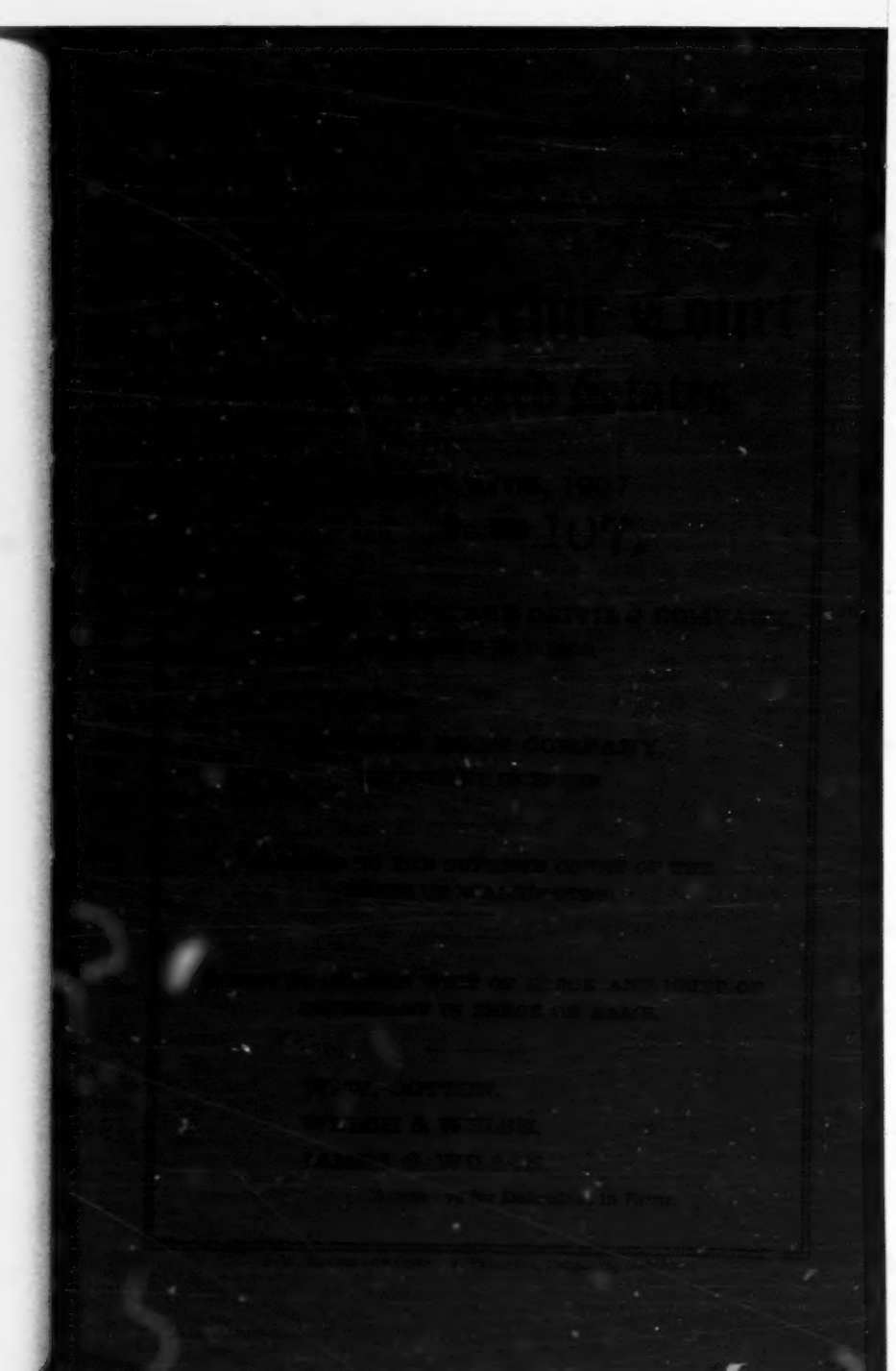
We assert that counsel's statement that the question of the repugnancy of this decision to the Fourteenth Amendment was raised in the petition for rehearing is

not sustained by the record (transcript, page 381); and, further, even if sustained by the record, the same was raised too late for review in this court.

The plaintiff in error's brief is entirely silent as to any portion of the record that shows it presented the question to the state court. As a matter of fact, counsel cannot point out any place in the record where the same was so submitted or presented, and this writ of error to this court is frivolous, and is taken simply for the purpose of delay, and we submit that the same should be dismissed.

Respectfully submitted,

W. W. COTTON,
WELSH & WELSH,
JAMES G. WILSON,
Attorneys for Defendant in Error.



No. 20762

IN

The Supreme Court of the United States

October Term, 1907

No. 359

NORTH SHORE BOOM & DRIVING COMPANY,
Plaintiff in Error,
v.
NICOMEN BOOM COMPANY,
Defendant in Error.

NOTICE

To North Shore Boom & Driving Company, Plaintiff in Error, and to W. H. Abel, Chas. E. Miller and Piles, Howe & Farrell, your Attorneys:

You are and each of you is hereby notified that the defendant in error, the Nicomen Boom Company, will submit its motion to dismiss the writ of error heretofore issued in this cause from the Supreme Court of the United States to the Supreme Court of the State of Washington, at the court room of the United States Supreme Court in Washington,

District of Columbia, on Monday, January 20th 1908, on the convening of said Court, or as soon thereafter as the same can be submitted. A copy of which said motion to dismiss and brief of argument thereon is herewith served upon you.

W. W. COTTON,
WELSH & WELSH,
JAMES G. WILSON,
Attorneys for Defendant in Error.

Due service of the foregoing notice and motion to dismiss the writ of error referred to and brief of argument thereon, and receipt of copy thereof is hereby acknowledged, at _____, this _____ day of December, 1907.

_____

_____

Attorneys for Plaintiffs in Error.

IN

The Supreme Court of the United States

October Term, 1907

No. 359

THE NORTH SHORE BOOM & DRIVING COMPANY,
Plaintiff in Error,
v.
NICOMEN BOOM COMPANY,
Defendant in Error.

MOTION TO DISMISS WRIT OF ERROR

Comes now the defendant in error above named, the Nicomen Boom Company, and moves the Court for an order that the writ of error heretofore issued by A. Reeves Ayers, clerk of the United States Circuit Court for the Western District of Washington, and made returnable to the Supreme Court of the United States within 60 days from the date of said writ, and which said writ was directed to the Supreme Court of the State of Washington, to review the judgment in the cause wherein the Nicomen Boom Company was plaintiff and appellant, and North Shore Boom & Driving Company was de-

fendant and appellee, said writ of error being dated 13th day of March, 1907, be dismissed and held for naught, on the following grounds and for the following reasons, to-wit:

First. That there was not drawn in question in said decree or judgment of the Supreme Court of the State of Washington, or the judgment of the Superior Court of Washington for Pacific County, entered in accordance with the mandate of the Supreme Court, or in the issue in the suit in which said judgment or decree was entered, the validity of any treaty or statute of, or any authority existing under, the United States, nor was said decree or decision in said suit against the validity of any treaty or statute of, or any authority exercised under, the United States.

Second. That there was not drawn in question in said decree or judgment in said suit, nor in said suit in the state Court, the validity of any statute of, or authority exercised under, any state, on the ground of its being repugnant to the Constitution, or any treaty, or any law, of the United States, nor was said decree or judgment a decision in favor of the validity of any statute of, or any authority exercised under, any state, where the validity of the same was drawn in question on account of its being repugnant to the Constitution, or any treaty or law, of the United States.

Third. That no title, right, privilege or immunity was claimed by the plaintiff in error in said Supreme Court of the State of Washington, under the Constitution, or any treaty, or any statute, of, or of any commission held, or authority exercised under the United States, nor was said decree or judgment a decision against any title, right, privi-

lege or immunity specially set up or claimed by the plaintiff in error, under the Constitution, or any treaty, statute, commission or authority of the United States.

Fourth. That said decree and decision of the said Supreme Court of the State of Washington, and the judgment of the Superior Court entered in accordance with the mandate of the said Supreme Court, was based upon, and raised the grounds of local law, and does not involve a Federal question, nor was any Federal question decided by, or necessary to the decision of, the said Supreme Court.

Fifth. That the decision and decree or judgment of the said Supreme Court of Washington, and the judgment of the Superior Court entered in accordance with the mandate of the Supreme Court, did not necessarily involve a decision of a Federal question, nor was the decision of a Federal question necessary to sustain the same, and did not in fact involve a Federal question, but was based upon grounds independent of any Federal question.

Sixth. That no question attempted to be presented to this Court by the plaintiff in error in order to sustain the writ of error herein, was specially set up or claimed, or drawn in question by the said plaintiff in error, in any Court of the State of Washington, and that no such question was considered or passed upon by the said state Court.

Seventh. That the decision of the Supreme Court of the State of Washington was not against any title, right, privilege or immunity specially set up or claimed by the plaintiff in error, under the Constitution, or any treaty, or statute, or commission, or authority, of the United States.

Eighth. That no citation as required by law was ever served on defendant in error.

This motion is based upon the record returned to this Court in response to the writ of error issued herein, and as contained in the printed transcript of the same, and upon the records and files in said cause.

W. W. COTTON,
WELSH & WELSH,
JAMES G. WILSON,
Attorneys for Defendant in Error.

(Where reference to the transcript in this brief is made, it refers to the page of the printed transcript of record compiled by the clerk of this Court and not to the paging of the original transcript as shown in the margin of the printed transcript.)

STATEMENT

This is a motion to dismiss the writ of error heretofore issued to the Supreme Court of Washington, to review as it appears from the writ of error itself, a judgment of the Supreme Court of the State of Washington in the case entitled Nicomen Boom Company, a corporation, plaintiff and appellant, vs. North Shore Boom & Driving Company, defendant and appellee. (Trans., p. 407, 410.) It appears from the application for writ of error, however (Trans., p. 404), that plaintiff in error was trying to secure a writ of error from the United States Supreme Court to the Supreme Court of Washington to review a judgment of the Superior Court of the state entered in pursuance to the mandate of the Supreme Court of the state.

The opinion of the Supreme Court of the state was made and filed on September 30, 1905 (Transcript, p. 372), and the judgment of the Superior Court of the state was made and filed on the 6th day of December, 1905 (Transcript, p. 381). The judgment of the Superior Court of Pacific County entered in accordance with the mandate of the Supreme Court of the state was made and entered on January 16, 1906. (Trans. p. 394.)

The plaintiff in error bases its right to a hearing in this Court upon the ground that a right claimed by it under a statute of the United States was denied by the decision of the state Court. The statement of its right to a review here is set forth in its application for writ of error (Trans., p. 404), as follows:

"And your petitioner further represents that this action involves the question of the right on the

part of your petitioner to construct a boom in a navigable river within the United States, for the purpose of catching, sluicing, booming and rafting sawlogs and other timber products, under the Act of Congress of September 19, 1890, page 907, 26 Statutes at Large, 426, and a permit thereunder from the Secretary of War, your petitioner's rights thereunder having been denied by said decree."

The assignments of error filed by plaintiff in error are as follows:

Now comes the said plaintiff in error, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Washington, in the above-entitled matter, there is manifest error in this, to-wit:

1. For that the Court erred in not finding and deciding that plaintiff in error had a good and valid permission from the Secretary of War to construct its said boom.

2. For that the Court erred in finding and deciding that the defendant in error had a good and valid permission from the Secretary of War to hold the territory occupied by the boom of plaintiff in error for its contingent future necessities.

3. For that the Court erred in not finding and deciding that the permit and license granted by the Secretary of War to plaintiff in error to construct its said boom operated as, and was a, revocation of the permit and license previously granted by the Secretary of War to construct its said boom.

4. For that the Court erred in finding and deciding that at the time of the commencement of this action the defendant in error was entitled to the possession of, and to hold, the entire area covered

by its plat as filed in the office of the Secretary of State of Washington.

5. For that the Court erred in finding and deciding that the defendant in error had a right prior to that of the plaintiff in error, to the area covered by the said boom of plaintiff in error.

6. For that the Court erred in not finding and deciding that the defendant in error appropriated only so much of the area included within its said plat as filed in the office of the Secretary of the State of Washington, as was, at the time of the filing of the said plat of the plaintiff in error in the office of the Secretary of the State of Washington, actually used and occupied by it, the defendant in error, for boom purposes.

7. For that the Court erred in not finding and deciding that the defendant in error appropriated so much only of the area of the waters of the said North River, as was in actual use by it for boom and rafting purposes at the time it completed its said boom.

8. For that the Court erred in reversing the finding and judgment of the Superior Court of the State of Washington, in and for the County of Pacific.

9. For that the Court erred in giving and entering its said judgment in favor of the defendant in error.

10. For that the Court erred in giving and entering judgment impairing and violating the rights of the plaintiff in error under the fourteenth amendment of the Constitution of the United States.

W. H. ABEL,
Attorney for Plaintiff in Error.

(Trans., p. 405.)

The cause involved conflicting rights in a portion of North River claimed by both parties as a location for log booming purposes. It was commenced originally in the Superior Court of the State of Washington for Pacific County, by the defendant in error against the plaintiff in error, for an injunction to restrain the plaintiff in error from building a boom in North River, within the location of the defendant in error.

North River is a tributary of Willapa Harbor, an arm of the Pacific Ocean, and lies wholly within the State of Washington.

Each of the parties is a boom company.

The booming laws of Washington, which will be found in §4378 to 4394 of Ballinger's Code and Laws of Washington, provide that a corporation, organized for the purpose of doing a booming business, shall, within ninety days after its organization, file with the Secretary of State a plat or survey of the property or properties to be appropriated for its business. These companies are given the power of eminent domain and required to boom logs for all persons requiring their services. They are made liable for damages for failure to do this, or for any loss of logs through negligence.

Both parties had filed plats or surveys as provided in the said law covering, however, a portion of the same area, the filing of the plat of the defendant in error being prior to that of the plaintiff in error by about three years. The defendant in error shortly after filing its plat constructed a boom on a portion of the territory included in its plat, but did not extend the same throughout the entire area included in said plat. The plaintiff in error, after the defendant in error had operated for about three

years its boom as at first constructed was organized, and filed its plat under the state law covering a portion of the area in plat of defendant in error which had not been built on. The plaintiff in error began construction of a boom in this area claimed by defendant in error and the suit was thereupon commenced. In its complaint and supplemental complaint in the trial Court the defendant in error based its right to an injunction upon its prior compliance with the state law. (Plaintiff's complaint, Trans., p. 287-295, and supplemental complaint, Trans., pp. 301-302.) The plaintiff in error in its answers contented itself with a denial of the cause of suit set up in the complaint and supplemental complaint and did not plead or set up any affirmative defense or justification under the law of the United States referred to in its application for writ of error, assignments of error supra or under any law of the United States (Answer, Trans., pp. 297-300, and Answer to Supplemental Complaint, Trans., p. 302.)

On the trial each party introduced evidence tending to show a permission from the Secretary of War under the River and Harbor act.

In the issues joined there was no question raised of the repugnancy of the state booming laws to the Constitution of the United States, or any law, or treaty of the United States, nor was any claim specially set up by the plaintiff in error of an authority in it under the United States, or under any statute of the United States.

The Superior Court found against the defendant in error and gave judgment in favor of the plaintiff in error. In its findings of fact said Court found that the defendant in error had complied with the State law in filing its map of location, and also had

complied with the United States law, and had acquired a license or permit from the Secretary of War to build its boom throughout its located territory. (See Findings of Fact Nos. 1 and 3, Trans., pp. 310 and 311.)

The said Superior Court also found that the plaintiff in error had filed its map of location, as required by said law, subsequently to the defendant in error, and the only permit from the Secretary of War said plaintiff in error ever had was a certain letter as follows:

> United States Engineer's Office,
> Seattle, Washington, March 23, 1903.

Mr. John F. Hobi, South Bend, Washington.

Dear Sir:—Referring to your application of February 7, 1903, for permission to construct and maintain a boom for storage of logs in North River, Pacific County, Washington, the Secretary of War directs that you be informed that the War Department will interpose no objection to its construction and maintenance in the manner proposed so long as it does not unreasonably interfere with navigation.

By direction, and in the absence of Major Millis.

Very respectfully,

JAS. H. MURPHY, Chief Clerk.

(Trans., p. 312.)

As shown above, the plats of location of both parties covered a portion of the same territory, and this conflicting territory was the location in dispute.

The defendant in error, in constructing its boom, had not built the same throughout the entire length of the located territory, as shown on its plat filed with the Secretary of State, but had built the same

to an extent sufficient to handle the business at the time. The said Superior Court further found that the defendant in error always intended to build its boom throughout the territory shown on its plat as the development of the business required. (Finding of Fact No. 5, Trans., p. 311.)

But because of the fact that the defendant in error did not construct throughout its entire location at the beginning, the said Superior Court decided that it had abandoned or forfeited, under the state law, that portion not built upon, and that therefore the plaintiff in error had a right to build thereon its boom, and therefore decided in favor of the plaintiff in error. (Memorandum Decision of Superior Court, Trans., pp. 274 and 275.)

The defendant in error appealed to the Supreme Court of the State of Washington from the judgment of said Superior Court. (Trans., pp. 325-326.) The Supreme Court of Washington reversed the judgment of the Superior Court. This judgment of the Supreme Court, or the judgment of the Superior Court entered in pursuance thereof, is the judgment of the state Court that is sought to be reviewed in this Court in this proceeding. The judgment of the Supreme Court is found in the transcript, at page 381, and is as follows, omitting the title:

"This cause having been heretofore submitted to the Court upon the transcript of the record of the Superior Court of Pacific County, and upon the argument of counsel, and the Court having fully considered the same, and being fully advised in the premises, and having filed its opinion in writing, it is now, on the 6th day of December, A. D. 1905, on motion of W. W. Cotton, Esq., of counsel for appellant, considered, adjudged and decreed that the

judgment of the said Superior Court be, and the same is hereby, reversed, with costs, the petition for rehearing denied, and the said Nicomen Boom Company have and recover from the said North Shore Boom & Driving Company the costs of this action taxed and allowed at $313.20, and that execution issue therefor.

"It is further ordered that this cause be remitted to the said Superior Court for further proceedings in accordance with the opinion herein filed."

The opinion referred to in said judgment, setting forth the grounds on which said judgment is based, is to be found in the transcript, at pages 372 to 380.

POINTS AND AUTHORITIES

I.

Where the first mention made of any Federal question is in the assignment of error, or in the petition for a writ of error, the raising of the Federal question comes too late. The assignment of error is no part of the record below, and a Federal question stated therein for the first time is not sufficient to give jurisdiction to the Supreme Court of the United States on writ of error to a state Court.

Corkran Oil Co. v. Arnaudet, 199 U. S. 193;
Chapin v. Fye, 179 U. S. 127;
Fullerton v. Texas, 196 U. S. 192;
Allen v. Arguimbau, 198 U. S. 149;
Leeper v. Texas, 139 U. S. 462.

II.

The only appellate jurisdiction which has ever been conferred by Congress upon the Supreme Court of the United States to review judgments or decrees of the highest courts of a state, is by writ of error:

Dower v. Richards, 151 U. S. 666;
Cohens v. Virginia, 6 Wheat. 264, 410;
Verdens v. Coleman, 22 How. 192.

and that only in cases within the purview of section 709 of the Revised Statutes.

Capital Bank v. Cadiz Bank, 172 U. S. 430.

III.

A writ of error from the Supreme Court of the United States to the Supreme Court of a state, can be sustained only when the decision is against the right specially set up or claimed under the Constitution and laws of the United States, and if the decision of the state court rests upon independent grounds of law, sufficient to sustain it but not involving a Federal question, the Supreme Court of the United States has no jurisdiction and will dismiss the writ of error, and this, even in a case where a Federal question is also decided.

Taylor on Jurisdiction and Procedure of U. S. Supreme Court, §§238-240.
Rutland R. R. Co. v. Central of Vermont R. R. Co., 159 U. S. 638;
Eustis v. Bolles, 150 U. S. 366;
Cal. Powder Co. v. Davis, 151 U. S. 393;
Giles v. Teasley, 193 U. S. 160;
Sawyer v. Piper, 189 U. S. 156;
Harrison v. Morton, 171 U. S. 46;
Allen v. Arguimbau, 198 U. S. 154;
Chapin v. Fye, 179 U. S. 128;
Corkan Oil Co. v. Arnaudet, 199 U. S. 193;
Fullerton v. Texas, 196 U. S. 192;
Capital Bank v. Cadiz Bank, 172 U. S. 425;
Dower v. Richards, 151 U. S. 666;
Egan v. Hart, 165 U. S. 188;
McMillan v. Ferrum Min. Co., 197 U. S. 343.

IV.

The mere fact that the controversy arose out of a location in a navigable water in the United States, or under a statute of Congress, would not necessarily raise a Federal question within section 709 of the Revised Statutes.

Egan v. Hart, 165 U. S. 188;
McMillan v. Ferrum Min. Co., 197 U. S. 347;
Telluride P. T. Co. v. Rio Grande W. R. Co., 175 U. S. 643.

V.

The effect of the tenth section of the River and Harbor Act is to make the erection of a structure in a navigable river within the limits of a state dependent upon the concurrent or joint assent of both the National Government and the state government. The question of whether or not the assent of the National Government had been acquired might raise a Federal question and authorize a writ of error, but the question of whether or not the assent of the state had been obtained, is purely a matter of local and state law and does not involve a Federal question.

Cummings v. Chicago, 188 U. S. 431;
Montgomery v. Portland, 190 U. S. 103.

ARGUMENT

I.

The plaintiff in error bases its right to a hearing in this Court on the ground that a right, claimed under a statute of the United States, was denied by the Supreme Court of the State of Washington, stating its right in its application for writ of error, as follows:

"And your petitioner further represents that this action involves the question of the right on the part of your petitioner to construct a boom in a navigable river within the United States, for the purpose of catching, sluicing, booming and rafting sawlogs and other timber products under the Act of Congress of September 19, 1890, Chap. 907, 26 Stat. L. 426, and a permit thereunder from the Secretary of War, your petitioner's rights thereunder having been denied by said decree. (Trans., p. 404.)

In the last assignment of error, in addition to the right claimed under this statute, it would seem that the plaintiff in error is attempting to set up some right under the fourteenth amendment to the Constitution of the United States; but inasmuch as this statement of the same in the assignment of error is the first mention made of any such constitutional question, we will not discuss the point with reference thereto, but will simply call the attention of the Court to a number of decisions in which it holds that the assignment of error is no part of the record below, and that a Federal question stated therein for the first time, is not sufficient to give jurisdiction to this Court on writ of error:

Corkran Oil Co. v. Arnaudet, 199 U. S. 193;
Chapin v. Fye, 179 U. S. 127;

Fullerton v. Texas, 196 U. S. 192;
Allen v. Arguimbau, 198 U. S. 149;
Leeper v. Texas, 139 U. S. 462.

As to the other point, to-wit, that a right claimed under a United States statute was denied, we also contend that it was not presented by the record in the Court below. The question was not decided in the Supreme Court of the State of Washington, nor in any court in the State of Washington, and, furthermore, that if such a question were presented and decided by the said Court, then there were two grounds upon which the state Court's decision rested, one of which was a non-Federal question, and the decision upon this non-Federal question was broad enough to sustain the judgment of the state Court.

In this connection, we will call the Court's attention first to the principle of law which has been so thoroughly established by the repeated decisions of this Court, and then we will call attention to the state of the record.

It has been repeatedly held that the only appellate jurisdiction which has ever been conferred by Congress on the Supreme Court of the United States to review judgments or decrees of the highest court of a state, is by writ of error.

Dower v. Richards, 151 U. S. 666;
Cohens v. Virginia, 6 Wheat. 264, 410;
Verdens v. Coleman, 22 How. 192.

and that only in cases within the purview of Section 709 of the Revised Statutes.

Capital Bank v. Cadiz Bank, 172 U. S. 430.

There are, therefore, just three classes of cases in which a writ of error will lie from this Court to a state court.

The plaintiff in error tries to justify under the third of these classes enumerated in Section 709, to-wit: That

"Where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute, or commission held, or authority exercised, under the United States, and the decision is against the title, right, privilege, or immunity, specially set up or claimed by either party under such constitution, treaty, statute, commission or authority."

This section of the Revised Statutes has been construed by this Court in a great many cases, and it is well established by those decisions that a writ of error from this Court to the Supreme Court of a state can be sustained only when the decision of the state court is against the right specially set up or claimed under the Constitution and laws of the United States, and if the decision of the said court rests on independent grounds of law sufficient to sustain it but not involving a Federal question, the Supreme Court of the United States has no jurisdiction and will dismiss the writ of error.

In Rutland R. R. Co. v. Central of Vermont R. R. Co., 159 U. S., at page 638, the Court says:

"The decree below, as appears by the mandate of the Supreme Court of Vermont, and still more clearly by its opinion, made part of the record, and reported in 63 Vermont 1, did not proceed exclusively on the decision of a Federal question, but also upon grounds of general law.

"The conclusion of that Court * * * that the statute of Vermont of 1882 * * * was unconstitu-

tional, was in favor of the Rutland Railroad Company, and therefore cannot be questioned upon a writ of error sued out by that company.

"The Court did declare that the provision of the statute, which requires the lessee to pay the tax and deduct the amount from the rent, does not impair the obligation of a contract. * * *

"But the decision of this part of the case (the only part decided against the plaintiff in error) was not put upon that consideration alone. On the contrary, the Court went on to say: 'But it by no means follows, because the defendant has paid to the state taxes, under a law afterwards held to be void, by withholding the amount thereof from the rent, that the Rutland Company can now claim the balance of the rent for this reason.' And this proposition was rested on several distinct grounds."

At page 640, the Court says:

"It is well settled, by a long series of decisions of this Court, that where the highest court of a state, in rendering judgment, decides a Federal question, and also decides against the plaintiff in error upon an independent ground, not involving a Federal question, and broad enough to support the judgment, the writ of error will be dismissed, without considering the Federal question." Citing a great many authorities.

In Eustis v. Bolles, 150 U. S., at page 366, it is stated:

"It is settled law that, to give this Court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for a decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided

adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it." (Citations.)

"It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this Court will not review the judgment."

And again, in the case of California Powder Co. v. Davis, 151 U. S., at page 393, the Court says:

"It is axiomatic that, in order to give this Court jurisdiction on writ of error to the highest court of a state in which a decision in the suit could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this Court without considering any Federal question that may also have been presented."

To the same effect see:

Taylor on Jurisdiction and Procedure of the U. S. Supreme Court, §§238-240.

Giles v. Teasley, 193 U. S. 160;

Sawyer v. Piper, 189 U. S. 156;
Harrison v. Morton, 171 U. S. 46;
Allen v. Arquimbau, 198 U. S. 154;
Chapin v. Fye, 179 U. S. 128;
Corkran Oil Co. v. Arnaudet, 199 U. S. 193;
Fullerton v. Texas, 196 U. S. 192;
Capital Bank v. Cadiz Bank, 172 U. S. 425;
Dower v. Richards, 151 U. S. 666;
Egan v. Hart, 165 U. S. 188;
McMillan v. Ferrum Min. Co., 197 U. S. 343.

In view of these decisions a reading of the opinion of the Supreme Court of the State of Washington, setting forth the grounds of its judgment sought to be reviewed in the present case, will convince the Court that no Federal question was decided by the Supreme Court of the State of Washington.

That decision and opinion, found at page 372 of the transcript, is based entirely upon the rights of the respective parties, and particularly the defendant in error, under the booming laws of the State of Washington. The Court, in the first part of its opinion, reviews the established facts in the case. It then proceeds to define the nature of the boom companies under the statutes of Washington, holding that such companies are quasi-public corporations, having the power of eminent domain. It then proceeds to determine what rights a boom company acquires by the filing of a plat of location, as required by the boom laws, holding that, by the filing of a plat of location the corporation acquires a right to construct its boom throughout the same, which

right is exclusive as to all other boom companies seeking the same right in the same area. (Trans., p. 376.)

The decision then goes on and determines that the defendant in error, by failing to construct its boom in the territory in dispute, had not forfeited its right thereto, but that in filing its location map it had the right to take into consideration the future necessities of its business, and file upon sufficient area to allow and provide for the reasonable development of the business. It then holds that defendant in error, having acquired the first right under the booming laws of the State of Washington, and having neither abandoned nor forfeited this right, it had such a right as would be protected by injunction; that is, the decision is based upon the respective rights of the two companies, as determined by the state law, without any question having been raised of any conflict of this law with the laws or Constitution of the United States, and was a decision upon a question merely of local state law and did not involve any Federal question.

The decision on this ground was sufficient to sustain the judgment, and the judgment was in fact so based upon this ground alone, the Court refusing to consider any other ground or question raised.

It is true that other questions were raised, and, among them, the defendant in error, who was appellant in the Supreme Court of the State of Washington, attacked the sufficiency of the permit from the Secretary of War to the plaintiff in error, under the River and Harbor Act, but the said Supreme Court of Washington expressly refused to pass upon this question. With reference to this point, said Court says:

"Appellant further urges that the record shows that the respondent's (defendant in error) boom and location are not lawful in that no sufficient permit has been granted to it by the War Department of the United States. For reasons above stated, it is unnecessary that we shall examine that question." (Trans., p. 379.)

It will be seen, therefore, that the said Court expressly refused to consider the question of the right which this plaintiff is claiming was denied him, for the reason that it was immaterial because of the view it had taken of the relative rights of the two companies under the state law.

Furthermore, the plaintiff in error never set up or claimed in the state Court, a right under the statute which it is now attempting to claim under. Any question which was raised under that statute, to-wit, the River and Harbor Act, was raised by the defendant in error; but, as heretofore shown, the Court ruled that it was unnecessary to pass on that question, and based its decision on grounds of general law involving no Federal question whatever.

The original brief of the plaintiff in error in the Supreme Court of the state is not in the transcript, but the petition for rehearing filed by the plaintiff in error can be found at page 381 of the transcript, from which it will be noted that no mention whatever is made of any right under the River and Harbor Act, or the denial of any claim of plaintiff in error thereunder. The entire objection of the plaintiff in error to the decision of the Supreme Court of the State of Washington is set out in its petition for rehearing as follows (Trans., p. 381):

"The respondent respectfully petitions that a rehearing in this cause be granted, and that an oral

argument be permitted upon the merits of the cause, and submits in support thereof the following:

"1. The decision of this Court assumes that the Nicomen Boom Company intended at some future time to occupy and use the area in dispute. No issue of intention was in issue in the trial Court, and this respondent was denied the right to offer evidence in rebuttal of such alleged intention.

"2. The Court assumes that future necessity might require the use of the disputed area by the Nicomen Boom Company. No issue of future necessity was raised by the pleadings, nor was this respondent permitted to offer evidence thereon.

"3. The necessary result of the Court's decision is to authorize a monopoly by the first boom company platting navigable waters, and the boom statute so construed is void, because in violation of our constitutional provision against the granting of exclusive rights and the conferring of a monopoly.

"4. The legal effect of filing a boom plat should be determined by the constructions reasonably given to the boom statute, and not by resort to any supposed analogy between the filing of such a plat and the filing of a railroad plat of location.

"5. In any event the respondent has expended a large sum of money, at this time about $20,000, and the rights of every logger upon North River are seriously affected and jeopardized by the decision, which virtually excludes competition and prevents the respondent company from fulfilling its contractual obligations with the several persons and companies operating logging camps. Should the Court finally decide that the North Shore boom is an infringement upon the rights of the Nicomen

Company, permission is respectfully asked to stay the operation of a mandatory injunction so that condemnation proceedings can be maintained and the large amount of money invested be not lost, and thereby in addition securing to the public the rights of competition."

The argument of said petition for rehearing was confined to the points as above set out, and no mention whatever was made of any right under the United States statute. We submit, therefore, that the record discloses that no right under the Federal statute was set up or claimed by the plaintiff in error in the state Court, and hence this Court is without jurisdiction of the cause. The plaintiff in error cannot set up or claim such right in this Court for the first time.

The mere fact that the controversy arose out of a location in a navigable water of the United States would not necessarily raise a Federal question within section 709 of the Revised Statutes.

Egan v. Hart, 165 U. S. 188;
McMillan v. Ferrum Mining Co., 197 U. S. 347;
Telluride P. T. Co. v. Rio Grande W. R. Co., 175 U. S. 643.

This river lies entirely within the State of Washington, and it has been held by this Court in the case of

Cummings v. Chicago, 188 U. S. 431,

in interpreting Section 10 of the River and Harbor Act, that

"The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable

river, within the limits of a state, depend upon the concurrent or joint assent of both the National Government and the state government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the state acting by its constituted agencies."

This principle was again affirmed in the case of Montgomery v. Portland, 190 U. S. 103.

If a person desiring to erect a structure in a navigable water of the United States wholly within a state fails to get the authority or assent of the United States, through its proper officers, or fails to get the assent of the state, he is not entitled to build his structure. The question of whether or not a man has gotten the assent of the United States might present a Federal question, but the question of whether or not a person has secured the assent of the state is purely a question for the state to decide, and presents no Federal question. The decision of the Supreme Court of Washington sought to be reviewed decided only that the defendant in error had acquired the prior assent of the State of Washington to the locus in quo and therefore the plaintiff in error had not acquired the authority from the state to build; that is, it decided that plaintiff in error had not secured the assent of the state. If this Court should take jurisdiction in the case and decide that the plaintiff in error had the assent of the United States, it would not avail the plaintiff in error anything for the reason that the state has

denied its assent to the plaintiff in error, and, under the decision in the Cummings and Montgomery cases, above referred to, the assent of both is required.

The decision of the Court of Washington therefore on the non-Federal ground is sufficient upon which to base the judgment, because the denial of the state authority to build in the place in question, irrespective of any authority from the United States, prevents the building of a lawful structure there. We therefore contend that this writ of error should be dismissed, for the reason that no Federal question was involved or decided by the Court, and also that the Court's decision is based upon a non-Federal ground, and that that ground is sufficient to sustain the judgment.

II.

No citation, as required by law, has ever been served upon the defendant in error.

Section 999 of the Revised Statutes provides that

"When the writ is issued by the Supreme Court to a Circuit Court, the citation shall be signed by a judge of such Circuit Court, or by a Justice of the Supreme Court, and the adverse party shall have at least thirty days' notice, and when it is issued by the Supreme Court to a State Court, the citation shall be signed by the Chief Justice, Judge or Chancellor of such Court rendering the judgment or passing the decree complained of, or by a Justice of the Supreme Court of the United States, and the adverse party shall have at least thirty days' notice."

The purported citation on this writ of error is as follows:

UNITED STATES OF AMERICA—SS.

To the Nicomen Boom Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty (60) days from the date hereof, pursuant to a Writ of Error, filed in the Clerk's office of the Supreme Court of the United States of Washington, wherein State of Washington **ex rel.** North Shore Boom & Driving Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the thirteenth day of March, A. D. 1907.

(Seal of the United States Circuit Court, Western District of Washington.)

A. REEVES AYERS,
Clerk of the United States Circuit Court for the Western District of Washington.

(Trans., p. 398.)

This is the only purported citation that was ever served upon the defendant in error. There appears in the transcript, however, a copy of an additional citation (Trans., p. 311), which purports to have been signed by the Chief Justice of the Supreme Court of Washington on the 13th day of March; but this citation was never served upon the defendant in error, and was not filed in the Supreme Court until the 10th day of June, 1907, long after the return day of the writ.

The return of service on the first citation above quoted is shown on page 399 of the transcript, and there is absolutely no return of service on the second citation.

The statute of the United States above quoted expressly provides that this citation shall be signed by a Judge of the State Court, or a Judge of the United States Supreme Court. There is absolutely no authority for the same to be signed by the Clerk of the Court, and a citation so signed was no more than blank paper and had no effect of notice.

Furthermore, the purported citation directs the defendant in error to appear in a cause wherein the State of Washington **ex rel.** North Shore Boom & Driving Company is plaintiff in error and it is defendant in error. The plaintiff in error in this cause is the North Shore Boom & Driving Company, and not the State of Washington on the relation of the North Shore Boom & Driving Company. There was, however, a cause in the Supreme Court of the State of Washington entitled, "State of Washington **ex rel.** North Shore Boom & Driving Company versus Nicomen Boom Company." That was a cause commenced by the North Shore Boom & Driving Company to condemn the property of the Nicomen Boom Company, and was commenced subsequently to the decision of the Supreme Court of Washington in the present case, and is the proceeding referred to in subdivision 5 of the petition for rehearing, where the North Shore Boom & Driving Company prays the Court to stay the operation of the mandatory injunction pending a condemnation proceeding.

Such a condemnation proceeding was commenced by the North Shore Boom & Driving Com-

pany, and was decided in the Superior Court adversely to the North Shore Boom & Driving Company, and was taken by writ of review from the Superior Court of the State of Washington to the Supreme Court of the State, and the writ of review was dismissed in the Supreme Court of the state. The decision in that case will be found in 89 Pac. Rep. at page 479. So that, the purported citation not only was improperly signed, but it did not cite the defendant in error to appear in the present cause, but cited it to appear in an entirely different proceeding, to-wit, the condemnation proceeding.

We therefore submit that the citation issued in this cause was entirely insufficient to bring the Nicomen Boom Company into Court.

We therefore respectfully submit that the writ of error in this case should be dismissed and the defendant in error go hence without day.

Respectfully submitted.

W. W. COTTON,
WELSH & WELSH, and
JAMES G. WILSON,
Attorneys for Defendant in Error.

No. 20762.

IN

The Supreme Court of the United States

OCTOBER TERM, 1908.

No. 107.

NORTH SHORE BOOM & DRIVING COMPANY,
Plaintiff in Error,

v.

NICOMEN BOOM COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of Washington.

Brief of Defendant in Error

This suit was commenced by the defendant in error in the Superior Court of the State of Washington for Pacific County, to enjoin the plaintiff in error from building a boom in North River, in the State of Wash-

ington, within the portion of said river included within the location made by the defendant in error, under the statute of the State of Washington relating to the construction of logging booms in the navigable waters of the State.

By a State statute, boom companies in Washington are, as stated in the opinion of the court below, quasi public corporations, having the power of eminent domain, required by law to file a map of location and to perform services for all persons requesting the same. (Trans., p. 374.)

The statute upon the subject is found in sections 4378 to 4394, Ballinger's Code and Laws of the State of Washington, and is printed herein as an appendix to this brief.

By section 4379 of the statute, any corporation seeking the benefit of the Act, must, within ninety days after its articles of incorporation have been filed, proceed to file in the office of the Secretary of State a plat of the survey of so much of the shore lines of the waters of the State, and lands contiguous thereto, as are proposed to be appropriated by the corporation.

Both the plaintiff in error and the defendant in error are boom companies which sought to obtain the benefit of the statute, for the purpose of constructing booms in North River. The following statement, taken from the opinion of the court below (Trans., p. 372), shows what each of the companies had undertaken to do to acquire such rights, and the situation of their respective booms, and the effect which the boom of the plaintiff in error had upon the boom of the defendant in error:

"Both companies are organized under the laws of this state which authorize the organization of corporations for the purpose of catching, booming, sorting, rafting and holding logs, lumber or other timber products. In April, 1900, being in due time after the organization of the plaintiff company, it caused to be filed in the office of the Secretary of State of the State of Washington, its plat and survey, showing so much of the shore lines and waters of North River and lands contiguous thereto as it proposed to appropriate under the laws of this state. Before beginning the construction of its boom, it sub-

mitted to the Secretary of War of the United States a plan of its proposed improvements and a plat of the territory to be occupied thereby, and was by said war department granted permission to construct a boom within the limits of said river covered by said plat of location. The territory designated by said plat of location embraces the shores of North River, which river is tributary to Willapa Harbor, a bay leading into the Pacific Ocean, and the territory extends from near the mouth of the river on both sides for some distance up the stream. The plaintiff thereupon acquired by purchase such upland and shore land on the left side of said river, reckoning down stream as was necessary for its use in the premises, and promptly proceeded to erect boom works along the left side of the river, but stopped short of the upper end of the territory covered by its plat of location. The boom was substantially constructed at a cost of about $16,000, and from the time of its erection until this controversy arose it was constantly operated as originally constructed. While the plaintiff has done some work above, yet its boom has never been completed beyond its rudder sheer as originally built. The plaintiff has, however, always expected to extend the boom within the limits of said plat of location as the demands of business might require, and some weeks before the commencement of this action it had ordered piling for the purpose of extending its boom as originally constructed about one thousand feet further up the river. Through some delay, for which plaintiff was not responsible, it did not have this piling upon the ground, and therefore did not commence the actual work of extending the boom until some days after the defendant had commenced to construct its boom as hereinafter mentioned. It was estimated by the plaintiff that the output of logs on North River for the season next following would be largely in excess of the output for the previous year, and that in such case the enlargement of its boom would be necessary for the purpose of receiving and handling such increased output. About this time, in August, 1903, the defendant company was organized, and it also filed its plat and survey in the office of the Secretary of State, showing so much of the water and shore lines of North River and land contiguous thereto as it

proposed to appropriate for its boom and driving purposes. It also claims that before commencing to construct its boom, it secured from the war department of the United States permission to construct within its said location. The plat of location filed by the defendant in the office of the Secretary of State covered substantially the part of the territory embraced in the plat of the plaintiff lying above the upper end of the sheer boom constructed by plaintiff as aforesaid. The defendant then proceeded to acquire uplands and tide lands within its plat of location, on the right side of the river, considered necessary for its use in the operation of its proposed boom, such lands being on the bank opposite to the side of the river occupied by the plaintiff's boom as constructed. On September 4, 1903, the defendant began the driving of piles for the construction of its boom, and erected a line of dolphins within the limits of both of said plats of location. Thereupon this action was brought. An emergency restraining order was issued, and afterwards, upon notice, a temporary injunction was granted pending final hearing of the action. It appears that the indemnity bond required by the court under the last named injunctional order was not given by plaintiff, and thereupon the defendant continued with its work of construction. At the time of the trial, the defendant had substantially completed the construction of its proposed boom. The boom of the defendant is so constructed that logs coming down the river intended to reach the plaintiff's boom will necessarily enter the main boom of the defendant. The booms as proposed by the plaintiff and defendant cannot both be constructed. If the boom of the plaintiff should be extended up the river, the passage between its line of dolphins and the dolphins of the defendant on the other side of the stream would be so narrow as to block navigation. Moreover, it would be impracticable to operate both booms under such circumstances. If the defendant is permitted to operate its boom as constructed, the boom of the plaintiff will receive only such timber from up the river as may escape from the boom of defendant and such as may be transmitted through that boom to the plaintiff. The foregoing facts are practically undisputed in the case, as we are advised by the

record and the findings of the court and by such exceptions as were taken to the findings."

As indicated in the opinion of the court below (Transcript, page 373), the questions passed upon by the Superior Court and the Supreme Court, related solely to the construction and effect of the state boom statute. The Superior Court, as shown by its opinion (Transcript, page 269, 274-275), reached the conclusion that section 4378 of the statute had the effect of forfeiting the rights of the defendant in error to all that portion of its location not included within its boom. The Supreme Court of the State, as shown by its opinion, places a different construction upon the statute, and held that the defendant in error had lost none of its rights to that portion of the stream included within its location, and that therefore the plaintiff in error must be enjoined from occupying any portion of the river covered by the location filed by the defendant in error. The questions, therefore, decided by the Superior Court and by the Supreme Court of Washington were questions which related to the construction and effect of the statute of the State, and on familiar principles this court will follow the construction placed upon the statute by the Supreme Court.

As appears from the quotation which has been made from the opinion of the court below (Transcript, pages 372, 373), the defendant in error submitted to the Secretary of War of the United States a plan of its proposed improvements and a plat of the territory to be occupied thereby, and was by the war department granted permission to construct a boom within the limits of the river covered by said plat of location. This permission is set out at page 357 of the Transcript, and is referred to in Finding of Fact 3 of the Superior Court (Transcript, page 311). This permission is dated the 14th day of April, 1900. (Plaintiff's Exhibit B, Transcript page 357.) Finding of Fact 7 made by the Superior Court (Transcript, page 312), is as follows:

"That prior to the commencement of this action the defendant applied to the secretary of war for permission to build a boom within the limits of its said plat of location, and that in response thereto it received from the

secretary of war the following and *on* (no) other permission, to-wit:

"B. O. United States Engineer Office.
"Seattle, Washington, March 23, 1903.
"Mr. John F. Hobi, South Bend, Wash.

"Dear Sir—Referring to your application of February 7, 1903, for permission to construct and maintain a boom for storage of logs in North River, Pacific County, Wash., the Secretary of War directs that you be informed 'that the war department will interpose no objection to its construction and maintenance in the manner proposed, so long as it does not unreasonably interfere with navigation.'

"By direction and in the absence of Major Millis.
"Very respectfully,
"JAMES H. MURPHY, Chief Clerk."

This finding is referred to in the opinion of the court below (Transcript, page 373) in the following language, the word "it" referring to the plaintiff in error: "It also claims that before commencing to construct its boom it secured from the war department of the United States permission to construct within its said location."

The court below, reversing the judgment of the Superior Court, ordered that the boom operations of the plaintiff in error must be restricted to the territory outside of the location of the defendant in error. (Opinion, Transcript, page 380.)

Ten errors are claimed to have been committed by the court below. (Assignment of Errors, Transcript, page 405.) Of these errors, the first, second, third and tenth only present any question possibly relating to any denial of any right claimed under the laws or the Constitution of the United States. These errors are the following:

1. The court erred in not finding and deciding that plaintiff in error had a good and valid permission from the Secretary of War to construct its said boom.

2. The court erred in finding and deciding that the defendant in error had a good and valid permission from the Secretary of War to hold the territory occupied

by the boom of plaintiff in error for its contingent future necessities.

3. The court erred in not finding and deciding that the permit and license granted by the Secretary of War to plaintiff in error to construct its said boom operated as, and was, a revocation of the permit and license previously granted by the Secretary of War to construct its said boom.

10. The court erred in giving and entering judgment impairing and violating the rights of the plaintiff in error under the Fourteenth Amendment of the Constitution of the United States.

No error was committed by the court below for the following reasons:

1. The question of federal right sought to be reviewed by this court was not raised by the pleadings or ever presented to or decided by either of the state courts.

2. If such question of federal right had been presented to the state courts, such question would not have affected the result.

ARGUMENT

I.

In Answer to Brief of Plaintiff in Error on the Jurisdictional Question.

The defendant in error heretofore moved to dismiss this writ of error, and filed a brief thereon, which motion was set for Monday, January 20, 1908, at which time the same was submitted, and the court reserved its decision until the argument on the merits. Since then, the plaintiff in error has served a brief, both on the motion and on the merits. In this brief plaintiff in error states that it heretofore submitted a brief on the motion to dismiss the writ of error, but no such brief has ever been served upon the defendant in error, and we know of no such brief.

The plaintiff in error has, in its brief, discussed abstract questions of law without regard to the record in the case. Our motion to dismiss the writ of error was based upon the ground, among others, as follows:

"Third. That no title, right, privilege or immunity was claimed by the plaintiff in error in said Supreme Court of the State of Washington under the Constitution, or any treaty, or any statute, or any commission held, or authority exercised, under the United States, nor was said decree or judgment a decision against any title, right, privilege or immunity specially set up or claimed by the plaintiff in error under the Constitution, or any treaty, statute, commission, or authority of the United States."

"Sixth. That no question attempted to be presented to this court by the plaintiff in error in order to sustain the writ of error herein was specially set up or claimed or drawn in question by the said plaintiff in error, in any court in the State of Washington, and that no such question was considered or passed upon by the said State court.

"Seventh. That the decision of the Supreme Court of the State of Washington was not against any right, privilege or immunity specially set up or claimed by the plaintiff in error under the Constitution, or any treaty,

or statute, or commission, or authority of the United States."

The plaintiff in error does not, in any part of its brief, point out in the record where any right, under the statutes of the United States it is now attempting to invoke, was claimed by it in the State court, or passed upon by the State court, and, as a matter of fact, throughout the entire record in the case, the plaintiff in error attempted to show that North River was not a navigable water of the United States within the terms of the River and Harbor Act; that said river was so shallow as to be a negligible quantity, so far as crafts navigating the same were concerned, and that the only practicable navigation of the stream was for logs in the freshet season.

It was the contention of the defendant in error throughout, that the stream was a navigable water of the United States, and hence both parties to the controversy were required to obtain a permit from the war department on plans authorized by the chief of engineers, in accordance with the River and Harbor Act.

The defendant in error further contended that the alleged permit of the plaintiff in error was not a sufficient permit under the River and Harbor Act, but the courts refused to pass upon this contention, basing their decisions entirely upon the construction of the State law, as will be pointed out later in this brief.

The contention of the plaintiff in error as to the immateriality of the rights under the United States River and Harbor Act, was so strongly made by the plaintiff in error in the State court, that it was reflected in the original opinion filed by the judge of the Superior Court in his decision of the case. The judge said (Transcript, page 269):

"The question raised by the pleadings and the brief call for a construction of the laws of the State relative to boom companies."

And again, at page 270:

"The plaintiff (defendant in error) before beginning any work, also submitted to the secretary of war the plan of its proposed improvements and a plat of the territory to be occupied thereby, and was granted a permit

by the war department to construct the boom within the limits of the whole territory covered by this litigation. The defendant (plaintiff in error) also submitted to the war department a somewhat indefinite and informal plat of its intended improvements in the river, and claims to have been authorized by the department to proceed therewith, which claim is disputed by the plaintiff. The proof on this subject is not clear, *but in my opinion the question is immaterial in passing upon the rights here involved.* The laws of the State do not require such a permit to be obtained, and the application to the war department is only made for the purpose of satisfying it that the interests of navigation will not be prejudiced by the proposed improvements. I think a boom company, organized under the laws of the State, could erect its works in the river without reference to the war department, provided the navigability of the river was not unreasonably obstructed thereby."

Again, at page 276, the court says:

"Without taking up the question as to the right of plaintiff to apply for an abatement of any nuisance that is common to the public, the facts in this case, in my opinion, do not show any disregard of this statute by the defendant. It is undoubtedly true that North River is a meandered and navigable stream, both above and below the lines of the disputed territory. The tide rises and falls for a distance of a mile or more above the uppermost end thereof. *But the portion of the river above the boom of defendant (plaintiff in error) is not navigable in the ordinary sense at low tide.* The navigability of the river is occasioned chiefly by the flooding of the tide. In the dry season the portion of the river not affected by the tide is not navigable within the contemplation of the law. In such seasons logs cannot be floated down that part of the stream. They can only be brought to the tide water through the swelling of the stream caused by occasional freshets. Still, the river is navigable at ordinary high tide, within the tidal section, by such vessels as ordinarily have occasion to ply thereon. *Yet, as a matter of fact, the chief use of the stream is for the floating of logs cut from the upper shores.* Not more

than a dozen settlers live along the banks of the river, and their customary transportation is furnished by canoes and rowboats. * * *"

The same matters are reflected in Finding of Fact No. 13 of the Superior Court. (Trans., p. 314.)

Furthermore, the plaintiff in error did not set up any right or title in itself. The right, as set forth in the complaint, is based entirely upon the title of the defendant in error. The plaintiff in error, in its answer, simply contents itself with denying the title of the defendant in error, as set up in its complaint. It nowhere raised the question of any right under the United States statute, but its contention throughout the State court was to the effect that the entire rights of the parties were determined by the State law, and not by any Federal law.

In the brief of plaintiff in error, filed in the State Supreme Court, and on which the judgment of the Supreme Court was based, the plaintiff in error's counsel says:

"The *appellant* (i. e., the defendant in error) lays the greatest stress upon the position that the respondent had no lawful right to erect its boom, resting its contention solely on the form of the assent of the national authorities.

"It will be borne in mind at the outset, that the United States government has not complained; that this is not an action to abate a public nuisance; that there is no claim that the respondent's structure interferes with the navigability of North River, at which the United States statute is aimed; that there is no claim that the respondent has acted in defiance of the United States authorities and did not have, at least, the colorable assent of the Secretary of War to erect its boom; but this action is, in legal contemplation, *simply an action to try title to the premises in dispute.*

"The three cases mainly relied upon, U. S. v. R. G. Irrigation Co., 174 U. S. 690; Cummings v. Chicago, 188 U. S. 410, and Montgomery v. Portland, 190 U. S. 89, *are not analogous,* for the reason that the moving party in each case was the sovereign itself, in the first moving directly and in the others through power delegated by it to municipal corporations; and in the Wash-

ington cases cited, the actions were to abate public nuisances.

"If a United States statute has been violated, or the Federal assent has not been, in fact, given, only the Federal government can complain.

Manuel v. Wulff, 152 U. S. 505;
McKinley C. Min. Co. v. A. U. M. Co., 183 U. S. 563.

"The latter is especially in point. The mining statutes of the United States require that the locator of a mining claim shall be a citizen of the United States, or have declared his intention to become such. There was no evidence that the locators of the mining claim in question were citizens of the United States, and it was claimed, therefore, that the location was not valid, *just as, in this case, it is claimed that the respondent's structure cannot be lawful, because a U. S. statute requiring the permission of the Secretary of War has been only colorably complied with.* * * *

"In the case at bar, the filing of the map and survey and taking possession of and enclosing the unoccupied waters of the State, constituted a valid appropriation. *The assent of the war department is but a mere incident to the possession and cannot be questioned by private parties whom it does not concern.*"

Here it will be seen that the defendant in error in this court was in the State court pressing the plaintiff in error on the question of its right under the United States law, but that the plaintiff in error in the State court not only did not make any claim under that statute, or rely upon any right under that statute, but was continually fighting shy of that question, and saying to the State courts: "You have no right to go into the question of our compliance with the United States statute; that question can only arise between myself and the Government of the United States;" and the State courts, pursuant to this strenuous objection on the part of the plaintiff in error to the State courts considering their rights under the United States statute, refused to pass upon that question, and defeated the plaintiff in error purely and simply upon the local State statute of Washington with regard to

boom companies. But then, when the plaintiff in error was defeated, irrespective of its rights under the United States statute, and on the grounds of controversy insisted upon by itself, its only hope lay in a writ of error to this court. But this court has repeatedly held that, in order to give this court jurisdiction, the question of the right or title claimed by the plaintiff in error under a United States statute, must have been specially set up, and the attention of the State courts specifically directed to the same in such a manner that the State court, at the time it passed upon the question, must know that the plaintiff in error was intending to, and was relying upon some right or title under a United States statute. But a plaintiff in error cannot shoo off the State courts from the question and then, when the decision is against it, come into this court and present the question for the first time. This has been repeatedly held by this court. In the case of Oxley Stave Co. v. Butler County, 166 U. S. 648, this court reviewed the question at considerable length, and, on page 653, says:

"Looking into the record we do not find that any reference was made in the court of original jurisdiction to the Constitution of the United States. Nor can it be inferred from the opinion of the Supreme Court of Missouri that that court was informed by the contention of the parties that any Federal right, privilege or immunity was intended to be asserted. For aught that appears the State court proceeded in its determination of the cause without any thought that it was expected to decide a Federal question."

And again, at page 654, the court says:

"Do such general allegations meet the statutory requirement that the final judgment of a state court may be re-examined here if it denies some title, right, privilege or immunity 'specially set up or claimed' under the Constitution or authority of the United States? We think not. * * * But can it be said that the plaintiffs *specially* set up or claimed the protection of that amendment against the operation of that decree by simply averring—without referring to the Constitution or even adopting its phraseology—that the decree was passed

against deceased persons as well in the absence of necessary or indispensable parties?

"The question must receive a negative answer, if due effect be given to the words 'specially set up or claimed' in section 709 of the Revised Statutes. These words were in the twenty-fifth section of the Judiciary Act of 1789 (1 Stat. 85), and were inserted in order that the revisory power of this court should not extend to rights denied by the final judgment of the highest court of a State, *unless the party claiming such rights plainly and distinctly indicated, before the State court disposed of the case, that they were claimed under the Constitution, treaties or statutes of the United States.* The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court. This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference."

To the same effect see:

Hulbert v. Chicago, 202 U. S. 279;
Marvin v. Trout, 199 U. S. 212, 223;
Osborne v. Clark, 204 U. S. 567;
Erie R. R. Co. v. Purdy, 185 U. S. 151.

In the present case the plaintiff in error cannot, throughout the State courts, induce those courts to decline to pass upon a Federal question, which was raised, not by itself, but by its opponent, and then, when it is defeated finally in the State courts, come in and claim that its rights under a Federal statute were denied it by the State courts, when it nowhere in those courts gave any intimation that it was claiming, or intended to rely upon any such rights, and without securing a determination of such rights.

The plaintiff in error, in its brief, has exhausted considerable space in the discussion of these questions, but it nowhere points out in the record where it ever secured

a ruling of the court on the claim it is now attempting to assert under the United States statute, or even brought that to the attention of the Court.

Furthermore, the plaintiff in error throughout this case admits that this controversy is, in legal contemplation, an action to try title to the premises in dispute. In such actions in the State of Washington, it is provided that the plaintiff in his complaint must set up in his complaint, the grounds on which his title is based, and the nature thereof; and the defendant may set up a legal or equitable defense to the plaintiff's claim, and the superior title shall prevail. Section 5508 of Ballinger's Codes and Statutes of Washington, provides as follows:

"The plaintiff in such action shall set forth in his complaint the nature of his estate, claim or title to the property, and the defendant may set up a legal or equitable defense to plaintiff's claims and the superior title, whether legal or equitable, shall prevail. The property shall be described with such certainty as to enable the possession thereof to be delivered, if a recovery be had."

And section 5509 of Ballinger's Code and Statutes of Washington provides:

"The defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer. If so pleaded, the nature and duration of such estate or license or right to the possession shall be set forth with the certainty and particularity required in a complaint. * * *"

By a reference to the complaint (Trans., p. 287) it will be seen that the defendant in error (plaintiff in the Superior Court of Washington), sets forth its own title and the nature thereof to the *locus in quo*. The plaintiff then alleges that defendant (plaintiff in error here) was incorporated in August, 1903, and that it purported to file in the office of the Secretary of State of Washington an instrument purporting to be a plat of survey of its proposed boom in Pacific County, in accordance with the boom laws of the State of Washington, but that said plat was insufficient under the State law, and further shows that the plaintiff in error was placing structures

in the location of the defendant in error, and asks that the plaintiff in error be enjoined. No mention is made in said complaint of any compliance by the plaintiff in error, or any claim of the plaintiff in error, set up under the River and Harbor Act, or any permit from the Secretary of War to the plaintiff in error. Thereafter, the defendant (plaintiff in error here) answered. (Trans., p. 297.) Said answer was simply a denial of certain portions of the plaintiff's complaint, and did not set up any right or title under the United States statute, under which it is now claiming.

Thereafter, the defendant in error filed a supplemental complaint (Trans., p. 301), setting up the construction of the plaintiff in error's boom since the commencement of the action, and asked that the boom be removed.

In the answer of the plaintiff in error to this supplemental complaint (Trans., p. 302), the plaintiff in error did not even then set up any right or title under the United States River and Harbor Act or a permit from the Secretary of War.

Under such circumstances, we submit, that the plaintiff in error, under the statutes of Washington above pointed out, did not properly raise the question in the State court, as required by the laws of that State, because it is specifically provided that unless such estate or right is set up in the answer, the defendant shall not be allowed to give in evidence any estate in himself or another in the property. Under such circumstances the State court certainly would not, and could not, know that any such title or right was being, or was intended to be, relied upon by the plaintiff in error, and, as a matter of fact, no such title was relied upon or claimed. As has been heretofore shown, the plaintiff in error avoided that question throughout.

The plaintiff in error, in its brief, argues that the court must necessarily have passed on the right under the Federal statute in passing upon the case. At page 21 of their brief, the counsel say:

"The Washington Supreme Court held that the filing of the boom plat was analogous to the filing of a plat

for the right of way of a railroad corporation, which would hold the location until actual abandonment, and therefore the defendant in error had the State assent, and that the plaintiff in error could not have such assent. *This was the sole question in the case as decided by the Supreme Court of the State of Washington,* and from its very nature could only be a Federal question."

We agree that the only question decided in the State court was that the defendant in error had the State assent to the building of its boom, and that the plaintiff in error had not such assent, and that therefore the question of whether or not the plaintiff in error had a permit from the Secretary of War, or whether or not the purported permit was a valid one or not, was absolutely immaterial, as we will point out in the latter part of this brief. It has been repeatedly held by this court that such a question is a matter of local law which can be more properly left to the local State authorities than to the Federal Government, and that such question does not present a Federal question; that the denial of the State assent to the plaintiff in error is not a denial of a right claimed under a Federal statute.

On page 23 of brief of plaintiff in error, counsel says: "The decree vests the defendant in error with a monopoly upon one of the most important highways on the Pacific Coast, and is in violation of the Fourteenth Amendment to the Constitution of the United States.

"That the decree violated this amendment to the Constitution of the United States in this respect was specifically urged in the petition for rehearing and was denied by the court, and thus a second Federal question was raised."

The petition for rehearing will be found on page 381 of the Transcript, and we particularly call the court's attention to the fact that no such question was presented as above stated by counsel. The only reference to a violation of a constitution is that in paragraph 3 (Trans., p. 382), as follows:

"The necessary result of the court's decision is to authorize a monopoly by the first boom company platting navigable waters, and the boom statute so construed is

void because in violation of *our* constitutional provision against the granting of exclusive rights and the conferring of a monopoly." The counsel here referred to the constitution of the State of Washington, as is shown by the argument on the petition for rehearing (Trans., p. 385), and the Supreme Court of the State passed upon that question with reference to the State constitution. (Trans., pp. 379, 380.) The provision of the State constitution referred to is Art. XII, Sec. 22, as follows: "Monopolies and trusts shall never be allowed in this state. * * *"

The State Supreme Court passed upon the question with reference to the State constitution, and held the location of defendant in error valid as against such objection. This court willl follow the State court decisions in questions of local law and constitution, authorities for which we will cite in the latter part of this brief. It is ridiculous to say that the question of violation of the Fourteenth Amendment was presented in the petition for rehearing. That amendment has no reference to any matter presented in said petition.

Erie R. R. Co. v. Purdy, 185 U. S. 150;
Osborne v. Clark, 204 U. S. 567.

Furthermore, the court on petition for rehearing did not grant the same or reconsider the question, but denied the petition without opinion. No rehearing was ever granted or had and a Federal question raised in that petition is too late. This court has declined to take jurisdiction when the first mention of the point is made in a petition for rehearing in the State court.

Capital Bank v. Codiz Dank, 172 U. S. 431;
Weber v. Rogan, 188 U. S. 10;
Barrington v. Mo., 205 U. S. 483;
Mutual L. Ins. Co. v. McGrew, 180 U. S. 87;
Turner v. Richardson, 180 U. S. 87.

The burden is on the plaintiff in error to show that the question was properly raised and passed on.

Chicago, Etc. Ry. Co. v. McGuire, 196 U. S. 132;
Fowler v. Lansen, 164 U. S. 252.

Plaintiff in error has failed to sustain such burden.

II.

On the Merits

In the present case the State Supreme Court, construing the State boom statute, has held that the defendant in error has the authority of the State to construct a boom within the limits of the location filed by the defendant in error under such State statute, and that the plaintiff in error has no authority from the state to construct any boom within that part of the North River included within the location of the defendant in error. Upon this point, it is said in the opinion of the court below (Transcript, page 380): "The court finds that the appellant's attempted extension cannot be made and operated by reason of the respondent's boom. The two cannot exist together. It follows that the respondent is unwarrantably interfering with appellant's location, and that in its booming operations the former must be restricted to territory outside of the latter's location."

This construction by the State court of the State statute and of the authority attempted to be exercised thereunder by the defendant in error will, on familiar principles, be followed by this court.

W. W. Cargill & Co. v. Minn., 180 U. S. 466;
Tullis v. Lake Erie & Western R. R. Co., 175 U. S. 353;
Missouri Pacific v. Nebraska, 164 U. S. 414;
N. Y. Central R. R. Co. v. Miller, 202 U. S. 595;
Soper v. Lawrence Bros., 201 U. S. 370, 371;
Tampa Water Works v. Tampa, 199 U. S. 243;
Gatewood v. North Carolina, 27 Sup. Ct. Rep. (U. S.) 170;
Rasmussen v. Idaho, 181 U. S. 200;
Yazoo & Miss. R. R. Co. v. Adams, 181 U. S. 583.

The effect of the decision of the court below is that the plaintiff in error has no right or authority from the State of Washington to construct a boom within any part of the river covered by the location of the defendant in error. Having no right from the State to erect a

boom, no permission or authority from the Secretary of War could confer any right upon the defendant in error.

Prior to the enactment of the River and Harbor Acts, the first of which was in 1890, this court held that the authority of the State to authorize structures in navigable waters wholly within the State is plenary, and that such State authority must necessarily be obtained before any lawful structure could be constructed in such waters. The decisions of this court rendered since the passage of the River and Harbor Act clearly show that no congressional action has been taken affecting in any way whatsoever the authority of the State to authorize structures in such navigable waters save and except to the extent that the person receiving State authority to erect such constructions must before exercising such authority submit plans of the proposed structure to the Secretary of War and obtain his consent to its erection; that the Secretary of War has no power to affirmatively authorize the erection of any structure in the navigable waters of the State without the consent of the State; and that a person who has not obtained the assent of the State and who is undertaking to exercise a permission of the Secretary of War to erect an obstruction in navigable waters, is erecting and maintaining a nuisance and may be enjoined by the State authorities or by any person injured or affected thereby.

The state of the law prior to the passage of the River and Harbor Acts above referred to is stated in the following cases:

Escanaba Co. v. Chicago, 107 U. S. 683;
Lake Shore & Mich. Ry. Co. v. Ohio, 165 U. S. 386;
Cummings v. Chicago, 188 U. S. 427;
Montgomery v. Portland, 190 U. S. 105.

In Escanaba Co. v. Chicago, 107 U. S. 683, it is said:

"The states have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience and prosperity of their people. This power embraces the construction of roads, canals and bridges,

and the establishment of ferries, and it can generally be exercised more wisely by the state than by a distant authority. They are the first to see the importance of such means of internal communication and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago river and its branches than any other state, and is more directly concerned for the prosperity of the city of Chicago, for the convenience and comfort of its inhabitants and the growth of its commerce, and nowhere could the power to control the bridges in that state, their construction, form and strength and the size of their draws and the manner and times of using them, be better vested than with the state or the authorities of the city upon whom does devolve that duty; when its power is exercised so as to unnecessarily obstruct the navigation of the river or its bridges, congress may interfere and remove the obstruction; if the power of the state and that of the federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the constitution to legislation in pursuance of it as the supreme law of the land, *but until congress acts on the subject, the power of the state over bridges across its navigable streams is plenary.* This doctrine has been recognized from the earliest period and approved in repeated cases."

And again, at page 687: "Bridges over navigable streams which are entirely within the limits of a state are of the latter class. The local authority can better appreciate their necessity and can better direct the manner in which they shall be used and regulated than the government at a distance. It is, therefore, a matter of good sense and practical wisdom to leave their control and management with the states, congress having power at all times to interfere and supersede their authority whenever they act arbitrarily and to the injury of commerce."

In Cummings v. Chicago, 188 U. S. 427, the above case is quoted with approval on the foregoing point. See also on this point, Lake Shore & Michigan Ry. Co. v. Ohio, 165 U. S. 366, and Montgomery v. Portland, 190 U. S. 105.

Section 10 of the River and Harbor Act of 1899, volume 6, Federal Stat., Ann., page 813, is now in force and reads as follows:

"That the creation of any obstruction not affirmatively authorized by congress to the navigable capacity of any of the waters of the United States is hereby prohibited, and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures in any port, roadstead, haven, harbor, canal, navigable river or other water of the United States outside of established harbor lines or where no harbor lines have been established, except on plans recommended by the chief of engineers and authorized by the Secretary of War."

The law as it now exists is stated and applied in the following cases:

Lake Shore & Mich. Ry. v. Chicago, 165 U. S. 366;
Cummings v. Chicago, 188 U. S. 427;
Montgomery v. Portland, 190 U. S. 105.

In the case of Lake Shore & Michigan Ry. Co. v. Ohio, 165 U. S. 365, the question as to how far this right of the states to authorize and control obstructions in navigable waters in the United States wholly within their territorial limits, was superseded by the River and Harbor Act of September 19, 1890, the provisions of which are similar to the River and Harbor Act of 1899, was considered. The court, at page 368, says:

"Conceding without deciding that the words 'waterways of the United States,' therein used, applied to all navigable waters even though they be wholly situated within the state, and passing also without deciding the contention that congress can lawfully delegate to the secretary of war all its powers to authorize structures of every kind over all navigable waters, nothing in the statute gives rise even to the implication that it was intended to confer such power on the Secretary of War. *The mere delegation to the secretary of the right to deter-*

mine whether a structure authorized by law has been so built as to impede commerce and to direct when reasonably necessary, its modification so as to remove such impediment, *does not confer upon that officer power to give original authority to build bridges, nor does it presuppose that congress conceived that it was lodging in the secretary power to that end.*

"When the distinction between the authorized structure so erected as to impede commerce and the unauthorized work of the same character is borne in mind, the fallacy of the contention relied on becomes apparent. The mere delegation of power to direct and change any lawful structures so as to cause them not to interfere with commerce, cannot be construed as conferring on the officer named the right to determine when and where a bridge may be built. If the interpretations claimed were to be given to the act, its necessary effect would be that congress in creating an additional means to control bridges erected by authority of law, had by implication confirmed and made valid every bridge built without sanction of law."

This foregoing language was quoted with approval and followed in the case of Cummings v. Chicago, 188 U. S. 428, with reference to section 10 of the Act of 1899, now in force.

In the Cummings case, *supra,* the appellants had secured from the secretary of war a permit to construct, in the State of Illinois, a dock, on certain plans submitted. The officers of the City of Chicago refused to give a permit for the construction of the dock, and the appellants proceeded, without any authority from the State of Illinois, to construct the dock. The question involved was whether or not the United States, by the River and Harbor Act of 1899, had assumed entire control of the Calumet river, a navigable stream lying wholly within the State of Illinois, and consequently whether or not a permit from the Secretary of War, under the River and Harbor Act, was sufficient authority to enable the appellants to construct their dock without reference to the city or state authorities. The court held that the authority of the Secretary of War was not sufficient. At

page 430 of the opinion, the court refers to the decision in Lake Shore & Michigan Railway v. Ohio, and says:

"The decision in Lake Shore & Michigan Ry. v. Ohio, was rendered before the passage of the River and Harbor Act of 1899, but the tenth section of that act, upon which the permit of the secretary of war was based, is not so worded as to compel the conclusion that congress intended by that section to ignore the wishes of Illinois in respect to structures in navigable waters that are wholly within its limits. We may assume that congress was not unaware of the decision of the above case in 1896, and of the interpretation placed upon existing legislative enactments. If it had intended by the act of 1899 to assert the power to take under national control for every purpose and to the fullest possible extent the erection of structures in the navigable waters of the United States that were wholly within the limits of the respective states, and to supersede entirely the authority which the states in the absence of any action by congress have in such matters, such a radical departure from the previous policy of the government would have been manifest by clear and explicit language. In the absence of such language it should not be assumed that any such departure was intended."

In reference to the act of 1899, the court, on page 427, says: "But congress has not passed any act under which parties having simply the consent of the secretary may erect structures in Calumet river without reference to the wishes of the State of Illinois on the subject."

After reviewing the former decisions of this court with reference to prior River and Harbor Acts and the rule applicable prior to the enactment of any law by congress with reference to the placing of structures in navigable waters, the court, at page 430, says: "We will not at this time make any declaration of opinion as to the full scope of this power (that is, power to regulate commerce under United States Constitution) or as to the extent to which congress may go in the matter of the erection or authorizing the erection of docks and like structures in navigable waters that are entirely within the

territorial limits of the several states, whether congress may, against or without the expressed will of a state, give affirmative authority to private parties to erect structures in such waters, it is not necessary in this case to decide; it is only necessary to say that the act of 1899 does not manifest the purpose of congress to go to that extent under the power to regulate foreign and interstate commerce, *and thereby to supersede the original authority of the states.* The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river within the limits of a state, depend upon the concurrent or joint assent of both the national government and the state government. The Secretary of War, acting under the authority conferred by congress, may assent to the erection by private parties of such a structure; without such assent the structure cannot be erected by them; but under existing legislation they must, before proceeding under such an authority, obtain also the assent of the state acting by its constituted agencies."

The decision in the Cummings case was quoted in the case of Montgomery v. Portland, 190 U. S. 89. In that case Montgomery was authorized by an order of the Secretary of War to extend a wharf to a relocated harbor line established by the Secretary of War within the limits of the city of Portland. The city authorities of Portland, having jurisdiction under the state, sought and obtained an injunction from the Supreme Court of Oregon, restraining the construction of the dock. From this judgment a writ of error was taken to this court and the judgment was affirmed. In the opinion the Cummings case is cited with approval at pages 103 and 106, and at page 107 the court says:

"It is sufficient now to say that the legislation upon which the defendant relies to justify the construction of the works in question, does not, when reasonably interpreted, indicate any purpose upon the part of congress to assume such complete and absolute control of the navigable waters of the United States as will make of no avail the action of the state in respect of the erection by private parties of structures in waters wholly within their respective limits."

See also

Manigault v. Springs, 199 U. S. 473,

in which the cases are again reviewed, and the court, at page 479, says:

"In Lake Shore, Etc. R. R. Co. v. Ohio, 165 U. S. 365, it was held that the act of September 19, 1890, conferring upon the Secretary of War the authority to direct the alteration of such bridges, so as to render navigation easy and unobstructed, did not deprive the states of authority to bridge such streams.

"While all of these cases turned upon the power of the state to authorize the erection of bridges, the same principle applies where the legislature deems it necessary to the public welfare to make other improvements for the reclamation of swampy and overflowed lands, though certain individual proprietors may thereby be subjected to expense. The question whether Kinloch Creek could be obstructed without the permission of the Secretary of War does not arise in this case, and is specially disclaimed by the plaintiff. See Lake Shore, Etc. Railroad Co. v. Ohio, 165 U. S. 365; Leovy v. United States, 177 U. S. 621, 633; Cummings v. Chicago, 188 U. S. 410; Montgomery v. Portland, 190 U. S. 89."

This was a case in which an act of South Carolina provided for the damming up of a navigable stream for the purpose of protecting property and the welfare of the people along it, and this court held that the state had the right.

In the case of

Jessup v. Trustees of Freeholders of the Town of South Hampton, 195 U. S. 624,

the case was dismissed for want of jurisdiction, on the authority of Cummings v. Chicago and Montgomery v. Portland. The case, as disclosed by the record below, was the right of an individual, under the local authority from the state, to build a solid bank roadway across a navigable bay; the party building the embankment having secured the consent of the Secretary of War.

See 56 N. E. 538.

This case was undoubtedly dismissed for want of jurisdiction, because the only question involved was the authority granted by the state authorities and no question with reference to the authority granted by the Secretary of war. Hence no Federal question was involved.

And again, the Circuit Court of Appeals for the Seventh Circuit, in the case of

Corrigan Transit Company v. Sanitary District, 137 Fed. 851,

in which an act of the legislature of Illinois, with reference to a change in the waterway of Chicago river, was in question. The state had secured the consent of the Secretary of War to make the improvements in the river in question. The court, at page 856, with reference to the tenth section of the River and Harbor Act of 1899, says:

"Congress, acting under the commerce clause, said to Illinois, which would otherwise be sovereign, 'You are not to change the course of the river unless you first obtain the secretary's approval of your plan.' The sentence in its entirety—the subjunctive clause as well as the indicative—expressed the will of Congress. The expressed intention was not to exclude Illinois utterly from exercising her police powers over the river for the welfare of her citizens (which suggests a nice and delicate question), but to permit the continuation of the exercise upon condition."

In the present case the defendant in error had obtained, under the state boom statute, the right to construct a boom within the limits of the location selected in North River, and had received under the hand and seal of the Secretary of War (Transcript, p. 357) permission to construct the boom within the limits of such location and on the plans submitted to the war department. The Supreme Court of the State, construing the boom statute and the rights of the defendant in error thereunder, held that such rights were valid and subsisting rights and necessarily prevented the plaintiff in error from undertaking to exercise any booming rights in the same location. (Opinion, Transcript, page 380.) The position of the state court is therefore to the effect that

the plaintiff in error had no right from the state to construct any boom within the limits of the location of the defendant in error, and it therefore followed that it was immaterial, in the absence of such right, what permission, if any, the plaintiff in error had received from the Secretary of War. In the absence of the state right the plaintiff in error occupied no other or different position from that occupied by the appellants in the cases of Cummings v. Chicago and Montgomery v. Portland, *supra*. The unauthorized act of the plaintiff in error interfered with the rights of the defendant in error, and therefore the defendant in error was entitled to an injunction. All of the contentions attempted to be made by the plaintiff in error in this case are clearly disposed of by the decisions to which attention has been called.

III.

As an additional reason why the opinion of the Supreme Court of Washington was correct, we submit that the permit from the Secretary of War under the River and Harbor Act does not confer any right to build a boom or place structures in navigable waters wholly within a state, but that the right and authority to erect such structures is conferred by the state.

The function of the Secretary of War, under the said legislation of congress, is not to confer an affirmative right, but simply to pass upon and consent to the authority granted by the state. His action is not positive but negative. The object of such legislation requiring such consent is to prevent unreasonable obstructions to the navigation of the waters of the United States. This is evident from a reading of the statute under which the Secretary grants the permit. The statute does not read that any person who acquires the consent of the secretary of war shall have the right to place obstructions in the river or navigable water, but it reads that the obstructions are prohibited and it shall be unlawful to place any obstruction "except on plans recommended by the chief of engineers and authorized by the Secretary of War." This is not an affirmative authorization, but is simply

preventive, and solely for the purpose of preventing impediments to navigation.

The original authority lying in the several states to authorize obstructions in navigable waters wholly within their respective limits, was not in any way superseded by the River and Harbor acts.

Lake Shore & Michigan Southern R. R. v. Ohio, *supra;*
Cummings v. Chicago, *supra;*
Montgomery v. Portland, *supra.*

The requirement in the River and Harbor acts of the authority of the secretary of war to the plans for the obstruction of any navigable river, did not confer upon such secretary power to grant original or affirmative authority for such obstruction.

In Lake Shore & Mich. So. R. R. v. Ohio, 165 U. S., at page 368, the court says:

"The mere delegation to the secretary of the right to determine whether a structure authorized by law has been so built as to impede commerce, and to direct, when reasonably necessary, its modification so as to remove such impediment, does not confer upon that officer *power to give original authority to build bridges, nor does it presuppose that congress conceived that it was lodging in the secretary power to that end.*"

This language is cited with approval on this identical point, in Cummings v. Chicago, 188 U. S. 428.

The affirmative authority comes from the state, and the Secretary of War simply stamps with approval or disapproval the plans under the affirmative right given by the state, according to whether or not such plans will interfere with navigation. The state court refused to pass upon the sufficiency of the pretended permit of the plaintiff in error from the Secretary of War (Opinion, Trans. p. 379), for the reason that the question became immaterial inasmuch as the court had, in the former part of its opinion, held that the defendant in error had obtained the right from the state, perfected by the approval and consent of the Secretary of War of the United States, and that the plaintiff in error had acquired

no right or authority from the state as against the defendant in error.

The refusal to pass on the sufficiency of the said permit was not a decision against the pretended right or title of the plaintiff in error under the United States statute, but was rather a decision in favor of said right or title, for said opinion concedes, for the purposes of the case, the sufficiency of the alleged permit of the Secretary of War to the plaintiff in error. But, even so, conceding the sufficiency of said permit, the judgment of the state court must have been the same. As against the defendant in error, plaintiff in error had no right from the State of Washington to construct a boom within the limits of the defendant in error, and having no such right, and only a permit from the Secretary of War, the plaintiff in error occupied exactly the same position as did the appellants in the case of Cummings v. Chicago, 188 U. S. 410, and Montgomery v. Portland, 190 U. S. 189. Hence, the question of the sufficiency of the permit of the plaintiff in error from the Secretary of War was immaterial, and the refusal of the state court to pass upon it was not error.

IV.

Having thus discussed the matter generally, the attention of the court will be called, in their order, to the particular errors specified by the plaintiff in error.

First: The court did not err in not finding and deciding that the plaintiff in error had a good and valid permission from the Secretary of War to construct its boom.

The court below did not err in the particular specified for the reason that the question as to whether or not the plaintiff in error had any permission from the Secretary of War was not raised in any way whatsoever by the pleadings. The answer (Transcript, p. 297) is simply a denial of the allegations contained in the complaint and does not contain any affirmative matter setting up any title in the plaintiff in error. Without such pleading no issue was made which could permit the plaintiff in error to introduce evidence of any title in

the plaintiff in error. The whole question presented by the pleadings is simply one which related to the title of the defendant in error.

This suit was in the nature of a suit involving the title to real property. As heretofore pointed out, by statute in the State of Washington it is provided that defendant in such a suit or action shall not be permitted to put in evidence title in himself or another unless such title is especially pleaded in the answer. Having contented itself simply with a denial of the title of the defendant in error set up in the complaint, the plaintiff in error could give evidence only of facts which showed insufficiency of title of defendant in error, but could not assert or establish, under the pleadings, any affirmative title in itself.

Even if the permission of the Secretary of War had been properly pleaded in the answer, such question would have been immaterial for the reason that the court below found that the plaintiff in error had no state right to build a boom, and therefore no permission, no matter how valid, from the Secretary of War could confer any right whatsoever upon the plaintiff in error.

Second: The court below did not err in deciding that the defendant in error had a good and valid permission from the Secretary of War to hold the territory occupied by the boom of the plaintiff in error for its contingent future necessities.

The Secretary of War granted to the defendant in error permission to build a boom within the limits of the North River covered by the location (Finding of Fact No. 3, Transcript, p. 311). His only function was to see that navigation was not interfered with unreasonably. After this permission was granted the question as to whether or not the permission could be exercised was a question wholly of state law, and the court below held that the defendant in error had state authority to occupy all of the river included within its location, and therefore all of the river covered by the permission from the Secretary of War.

Third: The court did not err in not finding and deciding that the permit and license granted by the Secretary of War to plaintiff in error to construct its

boom operated as, and was, a revocation of the permit or license previously granted by the Secretary of War to construct the boom of the defendant in error.

The letter of Murphy, chief clerk of the United States Engineer at Seattle (Transcript, p. 368, Finding of Fact No. 7, Transcript, p. 312), was the only permission ever granted from the War Department to the plaintiff in error to construct any boom. This permission is a mere letter from the United States Engineer office, and is not a formal permission executed under the hand and seal of the Secretary of War such as the Secretary executes in such cases and such as was executed in favor of the defendant in error. (Plaintiff's exhibit B, Transcript, p. 357.) It does not undertake to revoke the permission given by the Secretary to the defendant in error.

This permit of the defendant in error was given without reservation, had been acted upon, and the defendant in error had expended the sum of $16,000 in the construction of its boom. It certainly would not be revoked by the Secretary of War without notice to the defendant in error, and an opportunity to be heard.

Furthermore, there is no indication whatever of an intent by the said letter to revoke the former permit theretofore granted the defendant in error. When the application of the plaintiff in error was made, the Secretary must have been mindful of the previous permit granted to the defendant in error, and the fact that there might be a conflict, hence his refusal to grant a formal permit, under his hand and seal, and hence this informal letter from the chief clerk in the Seattle Engineer's office, which could be cancelled in case of conflict much easier than a formal permit under the hand and official seal of the Secretary. Certainly this letter, signed by a chief clerk in the United States Engineer's office, could not revoke the formal permission and authority given by the Secretary of War himself to the defendant in error.

The plaintiff in error in "Proposition I," page 28, "Proposition II," page 33, "Proposition III," page 36, "Proposition IV," page 38, of its brief, is seeking now to argue that the entire controversy is one in legal effect to try title to the *locus in quo*, and to place the title exclusively on the permit from the Secretary of War,

that the alleged permit to the plaintiff in error was a revocation of the prior permit to the defendant in error, and that having only constructed its boom to the extent of the requirements of the time of construction could not increase the same to meet the increased demands of business, and finally, that the United States government only can complain of the acts of the plaintiff in error.

But the plaintiff in error sets up none of these questions in the pleadings in the State court, and did not set up any affirmative title in itself as requested to do by the State statute in actions to try title. It contended strenuously to induce the State court not to pass on such questions and succeeded in it. It cannot now shift around and attempt to try the case on ground never passed upon or presented or clamed by it below. Plaintiff in error nowhere points out in the record where such rights were claimed or relied upon.

Furthermore, section 10 of the River and Harbor Act of 1899 provides that it is unlawful to build any boom or structures in the navigable waters "except on plans recommended by the Chief of Engineers, and authorized by the Secretary of War." There is no showing made that any plans of the structure of the plaintiff in error were ever recommended by the Chief Engineer, as required. Whereas, by reference to the plans (Exhibit B, Trans., p. 357, and map immediately preceding it), it will be seen that the plans of the defendant in error had received the recommendation of the Chief of Engineers before the authority of the Secretary of War was given.

We submit that the third assignment of error is not well taken.

Fourth: The only other assignment of error which has any reference to a federal question is the tenth (Trans., p. 383), to wit, for that the court erred in giving and entering judgment impairing and violating rights of the plaintiff in error under the provisions of the Fourteenth Amendment to the Constitution of the United States.

As shown on pages 15 and 18 of the brief on the motion to dismiss this writ of error, this assignment of error is the first statement, or even mention, in regard

to the contention on the part of the plaintiff in error, and, as there pointed out, the assignment of error is no part of the record below, and a federal question there stated for the first time is not sufficient to give jurisdiction to this court on a writ of error, and such an assignment will not be considered.

The plaintiff in error seeks, in its brief, to re-examine and re-argue the entire local question submitted to the state court. This was thoroughly threshed out, and the opinion of the court and authorities there cited fully sustain the ruling of the court in those particulars. We will, therefore, not encumber this brief with a re-argument of the questions there determined, but we submit that such questions cannot be re-examined, as they involve no federal question, and in any event, we are willing to rely upon the opinion of the state court as being fully justified by the authorities cited therein.

We therefore submit that, in case this court shall not grant the motion to dismiss of the defendant in error heretofore submitted by separate brief, upon the merits the judgment of the Supreme Court of the State of Washington should be affirmed, and the defendant in error given judgment against the plaintiff in error for its costs and disbursements herein.

Respectfully submitted,

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APPENDIX.

Laws of Washington With Reference to Boom Companies.

§4378. Any corporation heretofore or hereafter organized in the State of Washington for the purpose of catching, booming, sorting, rafting and holding logs, lumber or other timber products, shall have power to acquire, hold, use and transfer all such real and personal property or estate, by lease or purchase, as shall be necessary for carrying on the business of said corporation. If such corporation shall not be able to agree with persons owning land, shore rights, or other property sought to be appropriated, as to the amount of compensation to be paid therefor, and the compensation therefor may be assessed and determined and the appropriation made in the manner provided by law for the appropriation of private property by railways: Provided, That any property acquired under the provisions of this act by the exercise of the right of eminent domain shall be used exclusively for the purposes of this act; and whenever the use of said property as herein contemplated shall cease for a period of one year, the same shall revert to the original owner, his heirs or assigns, upon the repayment of the original cost of the same. (L. '90, Sec. 1, P. 470.)

§4379. Any corporation hereafter organized for the purpose mentioned in section one of this act shall, within ninety days after its articles of incorporation have been filed, proceed to file in the office of the Secretary of State a plat or survey of so much of the shore lines of the waters of the state and lands contiguous thereto as are proposed to be appropriated for said purpose by said corporation. Any corporation heretofore organized in the Territory of Washington, for any of the purposes expressed in section one (1) of this act, shall file such plat within ninety days after the passage of this act. Such plat shall be made from the records of the United States in the Surveyor-General's office of this state, or

by a competent surveyor, subsequent to actual survey. (L. '90, Sec. 2, P. 470.)

§4380. Such corporations shall have power and are hereby authorized, in any of the waters of this state or the dividing waters thereof, to construct, maintain and use all necessary sheer or receiving booms, dolphins, piers, piles or structure necessary or convenient for carrying on the business of such corporations. Provided, That such boom or booms, sheer booms or receiving booms shall be so constructed as to allow the free passage between any of such booms and the opposite shore for all boats, vessels or steam crafts of any kind whatsoever, or for ordinary purposes of navigation. (L. '90, Sec. 3, P. 471.)

§4381. After such works shall have been constructed, such corporation shall catch, hold and assort the logs and timber products of all persons requesting such service, upon the same terms and without discrimination; and shall have the right, in consideration of the convenience and security afforded to the public in the handling of logs and timber products, to charge and collect tolls on all logs or other timber products, caught within their works and upon the order or request of the owner or owners thereof, and there assorted, boomed or rafted; said tolls shall not exceed seventy-five cents per thousand feet on logs, spars or other large timber, and reasonable rates on all other timber products: *Provided*, That it shall be the duty of any corporation operating a boom at the mouth of any river, to catch and hold, assort, boom and raft all logs and timber products except such as may be already in charge of its owner or his agents without request of the owner or owners, and shall have the right to charge and collect tolls not to exceed seventy-five cents per thousand feet for such service. The amount of logs or timber is to be board measure, to be ascertained by the usual legal method of scaling; and such corporation shall have a lien upon the logs and timber products for the driving, floating, booming, sorting and rafting thereof, and the right to enforce such liens in any manner provided or that may be provided by law for the enforcement of liens upon personal property. Such corporation

shall, as soon as practicable, deliver logs or other timber products caught within their booms sorted and rafted ready for towing, to the owner or owners thereof, and if required to hold such property for more than thirty days, shall have the right to charge a reasonable rate for such storage for the period of excess. (L. '90, Sec. 4, P. 471.)

§4382. It shall be the duty of all said boom corporations, in assorting, to separate the logs, lumber or other timber products into separate booms ready for towing, so that logs or other timber products shall go to the mills or place intended for use or storage in one or more booms: *Provided.* That in case more than one boom is located on or in the same river or its tributaries the corporation owning the upper boom or works shall pass free of charge all saw-logs or other timber products consigned to the lower boom or booms. (L. '90, Sec. 5, P. 472.)

§4383. It shall be the duty of every corporation organized and transacting business under the provisions of this act to keep in the office of its secretary, open to public inspection, a book or books in which shall be truly recorded the facts, so far as known, regarding each and every raft by it assorted. Such record shall specify: 1st, names of owners; 2d, marks or brands; 3d, number of logs in each boom; 4th, number of feet in boom; 5th, name of steamer receiving possession; 6th, date of departure from boom. (L. '90, Sec. 6, P. 472.)

§4384. Corporations organized in accordance with the provisions of this act shall be liable to the owner or owners of logs or other timber products for all loss or damage resultant from neglect, carelessness or unnecessary delay on part of servants of such corporations: *Provided,* That loss caused by fire and ice, which cannot be reasonably guarded against, shall not be construed as resultant upon neglect or carelessness on the part of the corporation. (L. '90, Sec. 7, P. 472.)

§4385. In addition to such damages as are herein provided for any corporation wilfully neglecting to assort and deliver such logs and timber products accord-

ing to the provisions of this act, it shall be liable to a fine not exceeding twenty per centum of the value of such property which it shall have failed to deliver, but no such corporation shall be liable to such damages or penalty if said owner or owners of such logs or timber products shall have failed to furnish the necessary boom sticks and chains to raft the same. (L. '90, Sec. 8, P. 472.)

§4386. All meandered rivers, meandered sloughs and navigable waters in this state shall be deemed as public highways, and said corporations shall be declared public corporations for the purpose of this act; and the improvement of such streams, sloughs and waters shall be deemed and declared a public use and benefit.

§4387. Any corporation having for its object, in whole or in part, the clearing out and improvement of rivers and streams in this state, and for the purpose of driving, sorting, holding and delivering logs and other timber products thereon, may be organized under the laws of this state, and in accordance with the provisions of the codes and statutes of Washington, as set down and numbered in volume 1 of Hill's Annotated Statutes and Codes of Washington, sections 1497 to 1520, inclusive, and such corporations shall have all powers and be subject to all the liabilities and duties therein mentioned. (L. '95, Sec. 1, P. 128.)

§4388. Such corporation shall have power to acquire, hold, use and transfer all such real estate and personal property or estate, by lease or purchase, as shall be necessary for carrying on the business of said corporation. If such corporation shall not be able to agree with persons owning land, shore rights or other property sought to be appropriated, as to the amount of compensation to be paid therefor, the compensation therefor may be assessed and determined and the appropriation thereof be made in the manner provided by law for the appropriation of private property in chapter 6 of title 9, volume 2, Hill's Annotated Statutes and Codes of Washington: *Provided*, That any property acquired under the provisions of this act for the purposes herein mentioned by the exercise of

the right of eminent domain shall be used exclusively for the purposes aforesaid; and whenever the use of said property acquired by the right of eminent domain, as herein contemplated, shall cease for a period of one year, the same shall revert to the original owner, his heirs or assigns. (L. '95, Sec. 2, P. 129.)

§4389. Any corporation organized for the purposes mentioned in section one of this act shall, within ninety days after its articles of incorporation shall have been filed, proceed to file in the office of the Secretary of State a plat or survey of so much of the shore lines of the waters of the state or of any of the rivers or streams thereof and lands contiguous thereto as are proposed to be appropriated for such purposes by said corporation. Such plat shall be made from the records of the United States in the office of the Surveyor-General of this state, or by a competent surveyor, after actual survey, from the notes thereof, and whenever such appropriation is made upon unsurveyed lands, then by an actual survey made by a competent surveyor. Such corporation may from time to time, whenever it desires to extend its operations to portions of streams not embraced in its original plat, or to other streams tributary to the stream or streams described in such original plat, or any portion of such streams, file additional plats in the office of the Secretary of State, and whenever by reason of floods or otherwise, the channel of any stream shall be so changed as to put such streams beyond the limits of said original plat, or any supplemental or additional plat filed pursuant to the provisions of this section, such corporation may file in the office of the Secretary of State supplemental plats showing the change in said channel which shall vest it with the same rights that is acquired by the filing of said original plat. (L. '05, Sec. 1, Chap. 119.)

§4390. Such corporation shall have power and is hereby authorized in any of the rivers and streams of this state, or the dividing waters thereof, to remove jams, roots, snags and rocks, improve and straighten the channel, build wing dams and sheer booms, construct dams and gates, or otherwise, for the purpose of storing water with which to produce artificial freshets and for the pur-

pose of holding logs and other timber products and in all ways to improve such streams and rivers for the purposes herein mentioned and contemplated: *Provided,* That no such wing dam, sheer boom, dam with gate or otherwise, shall be so constructed, maintained or used as to in any manner obstruct or impede the outlet of such stream: *And provided further,* That if any such wing dam, sheer boom, dam with gate or otherwise shall be so constructed, maintained or used as to interfere with the use for any purpose of the waters of any stream so dammed or used, or any of its tributaries, or in any manner to injure or damage any lands adjacent to such stream or its tributaries, compensation for such interference with the use of such water and for any such injury or damage shall first be assessed and determined and the appropriation thereof may be made by the exercise of the power of eminent domain in the manner provided in section two of this act: *Provided, however,* That whenever the owners of more than one-half of the land lying alongside or abutting on any stream affected by the tide, proposed to be improved according to this act, shall file with the Board of County Commissioners of the county in which said river is situated a remonstrance against any improvements of so much of the stream as is affected by the tide, it shall then be unlawful for any corporation to take the land or any slough within the territory owned by any such remonstrancers: *Provided,* That such remonstrance shall be filed with said board within fifteen days from the filing of said plat. Nothing in this act shall be construed to authorize the taking or damaging of any power plant constructed or being constructed for the creation or utilization of water power. (L. '05, Sec. 1, Chap. 57.)

§4391. After such corporation shall have entered upon its duties, which shall be within three months of the time of filing of its maps of location, such corporation shall come in streams theretofore navigable, upon the request of the owners, and in case of logs and other timber products being commingled, or lying in such a position as to obstruct or impede the drive, without such request, and in streams not navigable before such improvements were made, without request, sluice, sack

and drive all logs and other timber products of suitable lengths that may be placed in the beds of the stream improved as aforesaid, or that may be delivered into its ponds, and shall handle all such logs and other timber products of all persons upon the same terms, without discrimination as to time of sluicing, sacking and driving such logs, or other timber products, and shall be entitled to charge and collect reasonable and uniform tolls for such services on all logs and other timber products so handled; such tolls shall not exceed one dollar per thousand feet, board measure, on logs, spars, or other large timber, and reasonable compensation on all other timber products, for sluicing, sacking and driving the same, such charges to be fixed by the board of trustees of such corporation in proportion to the distance such timber is to be driven and the number of dams through which the same is necessarily sluiced, and in case any such corporation shall be engaged in the booming and rafting of logs and other timber so sluiced, sacked and driven, an additional sum not exceed[ing] sixty cents per thousand feet for logs, spars and other large timber, and reasonable compensation on all timber products may be charged for booming and rafting the same; the amount of such logs and other products is to be determined by the usual method of scaling, and such corporations shall have a lien upon all logs and other timber products handled for sluicing, sacking and driving, and for booming and rafting the same, to be enforced in any manner now or hereafter provided by law for the enforcement of liens for labor on logs. (L. '01, Sec. 1, P. 295.)

§4392. Any corporation acting under and in accordance with the provisions of this act shall be liable to the owner or owners of logs or other timber products for all loss or damage resulting from neglect, carelessness or unnecessary delay on the part of such corporation or its agents. (L. '95, Sec. 6, P. 131.)

§4393. Should any corporation neglect, for the period of eight months after improving any stream or river, to operate its dams, or to otherwise perform its duties as herein provided, then all rights herein conferred to such

corporations upon such streams or rivers, or portions thereof, shall cease. (L. '95, Sec. 7, P. 131.)

§4394. Duly organized boom companies at present operating upon any of the streams or rivers of this state may file amended articles of incorporation to embrace the provisions of this act, and for the purpose of time limitations mentioned in this act, the time of filing such amended articles of incorporation shall be deemed to be the time of organization thereof, but failure to comply with the provisions of this act shall work forfeiture of the rights of such corporations only so far as the same are subjoined under the provisions of this paragraph. (L. '95, Sec. 8, P. 131.)

The boom laws above are set out as they exist today. Sections 4389 and 4390 were amended in 1905 in particulars immaterial to this controversy.